Deutscher Bundestag **Drucksache 17/9770**

17. Wahlperiode 23. 05. 2012

Beschlussempfehlung und Bericht

des Rechtsausschusses (6. Ausschuss)

zu der Unterrichtung
– Drucksache 17/7918 Nr. A.3 –

Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation
KOM(2011) 654 endg.; Ratsdok. 16000/11

hier: Politischer Dialog mit der Europäischen Kommission

A. Problem

Die Europäische Kommission hat einen Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulationen vorgelegt. Damit sollen die EU-Mitgliedstaaten verpflichtet werden, bestimmte Handlungen als Insider-Geschäfte oder Marktmanipulationen unter Strafe zu stellen. Wesentliches Ziel dieses Vorschlags ist der Kommission zufolge der Schutz eines integrierten und effizienten Finanzmarktes. Vor dem Hintergrund, dass der Vorschlag auf die strafrechtliche Annexkompetenz gemäß Artikel 83 Absatz 2 des Vertrages über die Arbeitsweise der Europäischen Union (AEUV) gestützt wird, der nach der Lissabon-Entscheidung des Bundesverfassungsgerichts seiner potentiellen Uferlosigkeit wegen zum Schutz der Entscheidungsbefugnisse des Deutschen Bundestages auf dem Gebiet des Strafrechts restriktiv auszulegen ist, werfen jedoch sowohl einzelne Tatbestände als auch die Begründung des Richtlinienvorschlags Fragen auf. Unter anderem ist unklar, warum die vorgesehenen strafrechtlichen Sanktionen zur Erreichung des angestrebten Ziels „unerlässlich" im Sinne einer restriktiven Anwendung des Artikels 83 Absatz 2 AEUV sein sollen. Ferner ist, um Nachbesserungsbedarf zu vermeiden, im weiteren Rechtsetzungsverfahren auf EU-Ebene auf die Kohärenz zwischen im Richtlinienvorschlag vorgesehenen Regelungen und der Rechtsprechungsentwicklung des Europäischen Gerichtshofes (EuGH) zu achten. Schließlich fasst der Richtlinienvorschlag einzelne Tathandlungen bedenklich weit und wirft die Frage nach der Vereinbarkeit mit dem grundrechtlichen Bestimmtheitsgebot auf.

B. Lösung

Kenntnisnahme des Vorschlags und Annahme einer Entschließung, mit der der Deutsche Bundestag die Kommission im Wesentlichen bittet, die Unerlässlich-

keit der vorgeschlagenen strafrechtlichen Sanktionen erneut zu prüfen und zu begründen, einschlägige Rechtsprechung des EuGH zu berücksichtigen und die Vereinbarkeit bestimmter vorgeschlagener Tatbestände mit dem Bestimmtheitsgrundsatz zu prüfen und zu begründen. Der Deutsche Bundestag soll seinen Präsidenten bitten, den Beschluss im Rahmen des politischen Dialogs an die Europäische Kommission, das Europäische Parlament und die Parlamente der Mitgliedstaaten zu übermitteln.

Annahme einer Entschließung mit den Stimmen der Fraktionen CDU/CSU SPD, FDP und BÜNDNIS 90/DIE GRÜNEN bei Stimmenthaltung der Fraktion DIE LINKE. unter Kenntnisnahme des Richtlinienvorschlags.

C. Alternativen

Ablehnung der Entschließung.

D. Kosten

Wurden im Ausschuss nicht erörtert.

Beschlussempfehlung

Der Bundestag wolle beschließen,

in Kenntnis der Unterrichtung auf Drucksache 17/7918 Nr. A.3 folgende Entschließung anzunehmen:

„I. Der Deutsche Bundestag stellt fest:

1. Die Europäische Kommission hat sich am 2. Oktober 2008 auf einer Konferenz zur „Überprüfung der Marktmissbrauchsregelung“ für eine effektivere Verhinderung von Marktmanipulationen und Insider-Geschäften ausgesprochen. Am 20. Oktober 2011 hat die Kommission die Richtlinie des Europäischen Parlaments und des Rates über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation (KOM(2011) 654 endg. – künftig: Richtlinienvorschlag) vorgelegt. Damit sollen sämtliche Mitgliedstaaten verpflichtet werden, wirksame, verhältnismäßige und abschreckende strafrechtliche Sanktionen für die schwerwiegendsten Verstöße gegen Rechtsvorschriften zu Insider-Geschäften und Marktmanipulation vorzusehen. Bei der Anwendung dieser Richtlinie ist den Bestimmungen des ebenfalls am 20. Oktober 2011 vorgelegten Vorschlags für eine Verordnung des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation (Marktmissbrauch) (KOM(2011) 651 endg. – künftig: Verordnungsvorschlag) einschließlich künftiger Durchführungsmaßnahmen Rechnung zu tragen. Der Bundesrat hat gegen den Richtlinienentwurf Subsidiaritätsrüge eingelegt und dazu Stellung genommen (Bundesratsdrucksachen 646/11 und 646/11 (Beschluss) (2)).

2. Der Deutsche Bundestag unterstützt das Ziel der Europäischen Kommission, das Vertrauen in die Finanzmärkte und damit ihre Funktionsfähigkeit zu stärken, indem Maßnahmen zur Eindämmung von Insider-Geschäften und Marktmanipulation ergriffen werden. Insider-Geschäfte und Marktmanipulation gefährden das Vertrauen zwischen Kleinanlegern und Finanzinvestoren auf der einen Seite sowie den Gesellschaften, an denen sie sich über den Kapitalmarkt beteiligen, auf der anderen Seite. Denn Insider-Geschäfte führen dazu, dass sich Insider-Aktionäre vor möglichen Verlusten besser schützen und von möglichen Gewinnen überproportional profitieren können. Das gefährdet das Gebot der Gleichbehandlung aller Aktionäre, wie es sich etwa in § 53a des Aktiengesetzes niederschlägt. Die Angst vor Aktionären „erster und zweiter Klasse“ ist geeignet, gerade Kleinanleger und ggf. auch Finanzinvestoren von einer Investition auf dem Kapitalmarkt abzuschrecken, so dass eine geringere Liquidität und damit eine Beeinträchtigung der Kapitalmärkte die Folgen sein können. Das gilt in noch stärkerer Weise für die Sorge von Kleinanlegern und institutioneller Finanzinvestoren, Opfer von Marktmanipulation werden zu können, indem Investitionsentscheidungen auf der Basis manipulierter Informationen getroffen werden. Daher ist sowohl gegen Insider-Geschäfte als auch gegen Marktmanipulation rechtlich vorzugehen.

3. Das deutsche Grundgesetz weist dem Deutschen Bundestag insbesondere im Zusammenhang mit strafrechtlichen Legislativinitiativen auf europäischer Ebene die Aufgabe zu, streng über die Einhaltung der Grundsätze der begrenzten Einzelermächtigung und der Subsidiarität zu wachen (BVerfG, 2 BvE 2/08 vom 30.06.2009 – Lissabon, Rz. 358: „Wegen der besonders empfindlichen Berührung der demokratischen Selbstbestimmung durch Straf- und Strafverfahrensnormen sind die vertraglichen Kompetenzgrundlagen für solche Schritte strikt – keinesfalls extensiv – auszulegen und ihre Nutzung bedarf besonderer Rechtfertigung. Das Strafrecht in seinem Kernbestand dient nicht als rechtstechnisches Instrument zur Effektuierung einer internationalen Zusammenarbeit, sondern steht für die besonders sensible demokratische Entscheidung über das

rechtsethische Minimum.“). Vor diesem Hintergrund kann der Deutsche Bundestag die Bundesregierung anweisen, ein Veto gegen den Legislativakt einzulegen, sowie sie dazu verpflichten, eine Nichtigkeitsklage vor dem Europäischen Gerichtshof (EuGH) nach Artikel 263 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) i. V. m. Artikel 8 des Protokolls (Nr. 2) über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit zu übermitteln, wenn die Kommission mit ihren Legislativvorschlägen die strafrechtlichen Kompetenzen der Union überschreitet. Dazu könnte sich der Deutsche Bundestag von Verfassungs wegen bereits dann verpflichtet sehen, wenn Anforderungen an die Erforderlichkeit einer strafrechtlichen Rechtsetzung auf der Ebene der Union nicht ausreichend dargetan sind. Die Hürden für eine solche Subsidiaritätsklage sind nach deutschem Recht sehr niedrig. Eine solche Klage wird bereits auf Antrag bloß eines Viertels der gesetzlichen Mitgliederzahl des Deutschen Bundestages erhoben (Artikel 23 Absatz 1a des Grundgesetzes (GG), § 12 Absatz 1 des Integrationsverantwortungsgesetzes).

4. Mit Blick auf den Grundsatz der Subsidiarität (Artikel 5 Absatz 3 des Vertrags über die Europäische Union) ist zu beachten, dass das Strafrecht in einem engen Zusammenhang zur Souveränität der Mitgliedstaaten steht. Daher gelten hier besonders hohe Anforderungen an die Erforderlichkeit der Rechtsetzung auf der Ebene der Union. Damit korrespondiert zwangsläufig ein gesteigertes Maß an Substantiiertheit bei der Darlegung dieser Erforderlichkeit. Bloß formelhafte und pauschale Hinweise auf unterschiedliche Strafrahmen oder Sanktionsformen in den Mitgliedstaaten, wie sie sich in Nummer 3.2 der Begründung des Richtlinienvorschlags bzw. Erwägungsgrund (3) des Richtlinienvorschlags finden, werden diesen Anforderungen nicht gerecht. Einen Einschätzungsspielraum im Hinblick auf diese Anforderungen kann die Europäische Kommission für sich nicht in Anspruch nehmen. Denn das Subsidiaritätsprinzip begründet eine negative Kompetenzgrenze der Union in Abgrenzung zu den Kompetenzen der Mitgliedstaaten. Kompetenzabgrenzungsnormen zwischen Trägern hoheitlicher Gewalt können sich aber nicht nach deren jeweils eigener Einschätzung richten, sondern müssen objektiv und rechtlich überprüfbar bestimmt werden.

5. Der vorliegende Richtlinienentwurf wird auf die strafrechtliche Annexkompetenz des Artikels 83 Absatz 2 AEUV gestützt. Das Bundesverfassungsgericht sieht in dieser Annexkompetenz eine „gravierende Ausdehnung der Zuständigkeit zur Strafrechtspflege im Vergleich zur bislang geltenden Rechtslage. […] Wegen drohender Uferlosigkeit dieses die Strafrechtssetzung betreffenden Kompetenztitels ist eine solche Kompetenzvorschrift mit dem Prinzip einer sachlich bestimmten und nur begrenzten Übertragung von Hoheitsrechten an sich ebenso wenig zu vereinbaren wie mit dem gebotenen Schutz des demokratisch an die Mehrheitsentscheidung des Volkes besonders rückgebundenen nationalen Gesetzgebers.“ (BVerfG, 2 BvE 2/08 vom 30.06.2009 – Lissabon, Rz. 361). Jedoch sei eine verfassungskonforme Auslegung dieser Vorschrift möglich aufgrund des engen Wortlauts der Norm, denn „die Angleichung entsprechender Rechtsvorschriften der Mitgliedstaaten [muss sich] als unerlässlich für die wirksame Durchführung der Politik der Union auf dem harmonisierten Rechtsgebiet erweisen.“ Daraus folgt für das Gericht, dass es „nachweisbar feststehen [muss], dass ein gravierendes Vollzugsdefizit tatsächlich besteht und nur durch Strafandrohung beseitigt werden kann.“ (BVerfG, 2 BvE 2/08 vom 30.06.2009 – Lissabon, Rz. 362).

6. Der von der Kommission vorgelegte Richtlinienentwurf über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation wird diesen Anforderungen nicht gerecht. Die Kommission begründet nur lapidar: „Da Marktmissbrauch grenzüberschreitend erfolgen kann, beeinträchtigen diese unterschiedlichen Herangehensweisen den Binnenmarkt und geben Tätern die Möglichkeit, missbräuchliche Praktiken in Ländern durchzuführen, in denen der jeweilige Verstoß nicht strafrechtlich geahndet wird. Mindestvorschriften in Bezug auf

Straftaten und strafrechtliche Sanktionen für Marktmissbrauch, die in nationales Strafrecht umgesetzt und von der Strafjustiz der Mitgliedstaaten angewandt werden, könnten zur Sicherung der Wirksamkeit der EU-Politik beitragen, da sie die gesellschaftliche Missbilligung dieser Taten auf eine qualitativ andere Art deutlich machen als verwaltungsrechtliche Sanktionen oder zivilrechtliche Ausgleichsmechanismen.“ (KOM(2011) 654 endg., S. 3, 4). Lediglich ein Beitragen zur wirksamen Durchsetzung der Unionspolitik zur besseren Bekämpfung von Marktmanipulation und Insiderhandel kann jedoch keine Unerlässlichkeit im Sinne von Artikel 83 Absatz 2 AEUV begründen.

7. Auch der bloße Verweis auf die Unterschiedlichkeit der Sanktionssysteme der Mitgliedstaaten im Bereich der Marktmanipulation und des Insiderhandels kann allein nicht ausreichen, da eine solche Feststellung das Handeln in allen Bereichen rechtfertigen würde, in denen die mitgliedstaatlichen Strafrechtssysteme unterschiedlich ausgestaltet sind. Konkrete Ausführungen macht die Kommission dagegen nicht, warum gerade in diesem Bereich keine anderen Maßnahmen in Frage kommen, um die Durchsetzung der Bestimmungen zur Bekämpfung der Marktmanipulation und des Insiderhandels wirksam in den Mitgliedstaaten voranzutreiben.

8. Eine allgemeine Kompetenz zur strafrechtlichen Angleichung ist nur unter den Voraussetzungen des Artikels 83 Absatz 1 AEUV vorgesehen, also hinsichtlich der dort aufgelisteten schweren Kriminalitätsbereiche, unter die der Insiderhandel und die Marktmanipulation nicht fallen, wobei die Straftaten aufgrund ihrer Art oder Auswirkung eine grenzüberschreitende Dimension haben müssen.

9. Strafrechtliche Sanktionen sind Ultima Ratio der Rechtsordnung und unterliegen aus guten Gründen besonderen rechtlichen Bindungen mit grundrechtlicher Qualität: Abschreckungs- und Warnfunktion des strafrechtlichen Tatbestandes kann nur erfüllt werden, wenn er für die Adressaten klar abgrenzbar und für den Adressaten verständlich formuliert ist. Die Freiheit der Bürger ist nur dann ausreichend geschützt, wenn im Vorhinein bestimmbar ist, wie strafbares von straflosem Verhalten zu unterscheiden ist. Ansonsten droht eine Verletzung des Rechtssatzes „nulla poena sine lege certa“, der nach Artikel 103 Absatz 2 GG, Artikel 7 Absatz 1 der Europäischen Menschenrechtskonvention und Artikel 49 Absatz 1 der Charta der Grundrechte der Europäischen Union Geltung beansprucht.

10. Nicht oder nur schwer bestimmbare Tatbestandsmerkmale strafrechtlicher Normen gefährden neben den Freiheitsrechten der Bürger auch die Funktionsfähigkeit und Effektivität der Kapitalmärkte. Nicht oder nur schwer bestimmbare Tatbestandsmerkmale sind geeignet, ein hohes Maß an Rechtsunsicherheit und Verunsicherung unter den Marktteilnehmern auszulösen. Das steigert Transaktionskosten und kann die Funktionstüchtigkeit und Liquidität der Finanzmärkte beeinträchtigen. Je mehr Rechtsunsicherheit konkrete Tatbestandsformulierungen zu verursachen geeignet sind, desto stärker befinden sie sich im Gegensatz zum eigentlichen Regelungsziel des Richtlinienvorschlags, nämlich die Funktionstüchtigkeit und Liquidität der Kapitalmärkte zu schützen.

11. Der Deutsche Bundestag teilt die Bedenken des Bundesrates, dass eine Ausweitung von Straftatbeständen nur bei sorgfältig begründeter Strafwürdigkeit des Verhaltens weiterer Beteiligter am Insiderhandel zu rechtfertigen ist (Bundesratsdrucksache 646/11 (Beschluss) (2) vom 16. Dezember 2011, Nummer 2). Die Bedenken umfassen auch die an die Mitgliedstaaten gerichteten Verpflichtungen, die „Aussendung falscher oder irreführender Signale“, die „Beeinflussung eines Kurses“ oder die „Verwendung sonstiger Kunstgriffe“ etc. unter Strafe zu stellen (Bundesratsdrucksache 646/11 (Beschluss) (2) vom 16. Dezember 2011, Nummer 3). Der Bestimmtheitsgrundsatz, der im Strafrecht grundrechtliche Qualität besitzt (siehe oben Nummer I.9), erfordert eine klare Begrenzung von Tatbeständen auf bestimmte Handlungsmodalitäten.

Der Deutsche Bundestag weist schließlich darauf hin, dass sowohl der Richtlinienvorschlag (Artikel 2 Nummer 2) wie der Verordnungsvorschlag (Artikel 6) den Begriff der „Insider-Information“ verwenden und ihn einheitlich neu definieren. Der Bundesgerichtshof hat erst in jüngerer Zeit gewisse Schwächen der bislang geltenden Definition der „Insider-Information“ aufgezeigt und dem Europäischen Gerichtshof u. a. die Frage vorgelegt, wie der Begriff der „Insider-Information“ zu bestimmen sei (BGH II ZB 7/09, Beschluss vom 22. November 2010). Die Klärung dieser Fragen durch den Europäischen Gerichtshof steht noch aus und könnte zu einem Nachbesserungsbedarf bei der Definition des Begriffs der Insider-Information führen.

II. Der Deutsche Bundestag fordert die Kommission daher zu folgenden Schritten auf:

1. Die Kommission prüft und begründet erneut die Unerlässlichkeit der im Richtlinienentwurf vorgesehenen strafrechtlichen Sanktionen und legt ihre Ergebnisse insbesondere in Bezug auf die „Einheitlichkeit“ der Sanktionierung innerhalb der Europäischen Union substantiiert dar.

2. Die Kommission beantwortet insbesondere die vom Bundesrat aufgeworfene Frage, warum es erforderlich sein soll, Sekundärinsider nicht lediglich mit Bußgeldern, sondern mit Strafe belegen zu müssen.

3. Die Kommission berücksichtigt die Erkenntnisse des EuGH zum Inhalt des zentralen Begriffs der „Insider-Information“, um kurzfristige Nachbesserungsbedarfe beim Richtlinienentwurf zu vermeiden.

4. Die Kommission prüft und begründet insbesondere unter Beachtung des strafrechtlichen Bestimmtheitsgrundsatzes die tatbestandliche Beschreibung von Marktmanipulationen, die als Mindestvorschriften in nationales Strafrecht umzusetzen sind.

III. Der Deutsche Bundestag bittet seinen Präsidenten, diesen Beschluss der Kommission, dem Europäischen Parlament sowie den Parlamenten der Mitgliedstaaten zu übermitteln.“

Berlin, den 23. Mai 2012

Der Rechtsausschuss

Siegfried Kauder (Villingen-Schwenningen)
Vorsitzender

Ansgar Heveling
Berichterstatter

Burkhard Lischka
Berichterstatter

Raju Sharma
Berichterstatter

Marco Buschmann
Berichterstatter

Jerzy Montag
Berichterstatter

Bericht der Abgeordneten Ansgar Heveling, Burkhard Lischka, Raju Sharma, Marco Buschmann und Jerzy Montag

I. Überweisung

Der Richtlinienvorschlag auf **Ratsdok. 16000/11** wurde mit Überweisungsdrucksache 17/7918 Nr. A.3 vom 28. November 2011 gemäß § 93 Absatz 5 der Geschäftsordnung dem Rechtsausschuss zur federführenden Beratung und dem Finanzausschuss, dem Ausschuss für Wirtschaft und Technologie sowie dem Ausschuss für die Angelegenheiten der Europäischen Union zur Mitberatung überwiesen.

II. Stellungnahmen der mitberatenden Ausschüsse

Der **Finanzausschuss** hat die Vorlage in seiner 89. Sitzung am 23. Mai 2012 beraten und empfiehlt, diese einstimmig zur Kenntnis zu nehmen.

Der **Ausschuss für Wirtschaft und Technologie** hat die Vorlage in seiner 69. Sitzung am 23. Mai 2012 beraten und empfiehlt unter Kenntnisnahme der Vorlage mit den Stimmen der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN bei Stimmenthaltung der Fraktion DIE LINKE. die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung, die von den Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN in den Rechtsausschuss eingebracht worden ist.

Der **Ausschuss für die Angelegenheiten der Europäischen Union** hat die Vorlage in seiner 66. Sitzung am 23. Mai 2012 beraten und empfiehlt einstimmig, die Vorlage zur Kenntnis zu nehmen.

III. Beratungsverlauf und Beratungsergebnisse im federführenden Ausschuss

Der **Rechtsausschuss** hat die Vorlage nach vorbereitenden Beratungen im Unterausschuss Europarecht in seiner 85. Sitzung am 23. Mai 2012 beraten und empfiehlt unter Kenntnisnahme der Vorlage mit den Stimmen der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN bei Stimmenthaltung der Fraktion DIE LINKE. die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung.

Die **Fraktion der FDP** dankte den Berichterstattern der Fraktionen für die konstruktive und konsensuale Zusammenarbeit, deren Ergebnis sich in der interfraktionellen Entschließung widerspiegele.

Die **Fraktion BÜNDNIS 90/DIE GRÜNEN** schloss sich dem Dank an und erklärte, inhaltlich unterstütze sie das Anliegen der Kommission, Insiderhandel stärker bekämpfen und strafrechtlich verfolgen zu wollen. Die Kritik richte sich auf den nachlässigen Umgang der Kommission mit den Verpflichtungen des Lissabon-Vertrages. Aufgabe des Deutschen Bundestages sei es, auch auf die Einhaltung der vom Bundesverfassungsgericht gezogenen Grenzen zu achten. Insbesondere die Ausführungen der Kommission zu Verhältnismäßigkeit, Subsidiarität und Zuständigkeit dürften nicht bloß formelhaft sein.

Die **Fraktion DIE LINKE.** bedauerte, nach der zunächst guten Zusammenarbeit auf Berichterstatterebene nicht in den Kreis der Antragsteller der Entschließung aufgenommen worden zu sein.

Berlin, den 23. Mai 2012

Ansgar Heveling Berichterstatter	**Burkhard Lischka** Berichterstatter	**Raju Sharma** Berichterstatter
Marco Buschmann Berichterstatter	**Jerzy Montag** Berichterstatter	

RAT DER EUROPÄISCHEN UNION

Brüssel, den 25. Oktober 2011 (OR. en)

16000/11

Interinstitutionelles Dossier: 2011/0297 (COD)

DROIPEN 125
EF 145
ECOFIN 717

VORSCHLAG	
der	Europäischen Kommission
vom	21. Oktober 2011
Nr. Komm.dok.:	KOM(2011) 654 endgültig
Betr.:	Vorschlag für eine RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation

Die Delegationen erhalten in der Anlage den mit Schreiben von Herrn Jordi AYET PUIGARNAU, Direktor, an den Generalsekretär des Rates der Europäischen Union, Herrn Uwe CORSEPIUS, übermittelten Vorschlag der Europäischen Kommission.

Anl.: KOM(2011) 654 endgültig

EUROPÄISCHE KOMMISSION

Brüssel, den 20.10.2011
KOM(2011) 654 endgültig

2011/0297 (COD)

Vorschlag für

RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES

über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation

{SEC(2011) 1217}
{SEC(2011) 1218}

BEGRÜNDUNG

1. HINTERGRUND DES VORGESCHLAGENEN RECHTSAKTS

Mit der Anfang 2003 verabschiedeten Richtlinie 2003/6/EG (Marktmissbrauchsrichtlinie) wurde ein umfassender Rahmen für die Bekämpfung von Insider-Geschäften und Marktmanipulation (zusammen „Marktmissbrauch“) geschaffen. Die Richtlinie zielt darauf ab, das Anlegervertrauen und die Marktintegrität zu verbessern, indem sie Personen, die über Insider-Informationen verfügen, den Handel mit davon betroffenen Finanzinstrumenten untersagt und die Manipulation der Märkte durch Praktiken wie die Verbreitung von falschen Informationen oder Gerüchten und den Abschluss von Transaktionen, mit denen ein anormales Kursniveau gesichert wird, verbietet.

Im Hinblick auf die Durchsetzung der Richtlinie 2003/6/EG müssen die Mitgliedstaaten im Einklang mit ihrem jeweiligen nationalen Recht dafür sorgen, dass gegen die Verursacher von Verstößen gegen die nationalen Vorschriften zur Umsetzung der Richtlinie Verwaltungsmaßnahmen getroffen oder verwaltungsrechtliche Sanktionen verhängt werden können. Das Recht der Mitgliedstaaten, strafrechtliche Sanktionen zu verhängen, bleibt davon unberührt.

In dem Bericht der hochrangigen Gruppe zu Fragen der EU-Finanzaufsicht[1] gab diese folgende Empfehlung ab: „Ein solider Rahmen für Aufsicht und Unternehmensführung im Finanzsektor muss sich auf eine wirkungsvolle Aufsichts- und Sanktionsordnung stützen können“. Nach Ansicht der Gruppe müssen die Aufsichtsbehörden dazu über ausreichende Handlungsbefugnisse verfügen und auf gleichwertige, starke und abschreckende Sanktionsregelungen für alle Rechtsverstöße im Finanzbereich zurückgreifen können, die wirksam durchgesetzt werden sollten.

Gemäß Artikel 14 der Richtlinie 2003/6/EG müssen die zuständigen Behörden im Interesse einer wirksamen Durchsetzung „wirksame, verhältnismäßige und abschreckende Sanktionen“ verhängen können. Eine wirksame Durchsetzung hängt darüber hinaus von den Ressourcen der zuständigen Behörden sowie von ihren Befugnissen und ihrer Bereitschaft zur Aufdeckung und Untersuchung von Marktmissbrauch ab. Nach Ansicht der hochrangigen Gruppe ist jedoch derzeit keine dieser Voraussetzungen erfüllt, und die Sanktionsregelungen der Mitgliedstaaten sind generell schwach und heterogen.

Die Kommission hat daher eine Mitteilung[2] zu Sanktionsregelungen im Finanzdienstleistungssektor veröffentlicht. Dieser Mitteilung zufolge sind strafrechtliche Sanktionen, insbesondere Gefängnisstrafen, generell als starkes Signal anzusehen, das den abschreckenden Charakter von Sanktionen bei angemessener Anwendung durch die Strafjustiz erhöhen könnte. Strafrechtliche Sanktionen eignen sich jedoch möglicherweise nicht für alle Arten von Verstößen und für jeden Fall. In

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[1] Bericht der hochrangigen Gruppe zu Fragen der EU-Finanzaufsicht, Brüssel, 25.2.2009, S. 23.

[2] Europäische Kommission, Mitteilung über die Stärkung der Sanktionsregelungen im Finanzdienstleistungssektor, KOM(2010) 716 endg. vom 8. Dezember 2010.

ihrer Mitteilung kündigt die Kommission daher an zu prüfen, ob und in welchen Bereichen die Einführung strafrechtlicher Sanktionen und die Festlegung von Mindestvorschriften zur Bestimmung von Straftaten und Sanktionen wesentlich zur Gewährleistung einer wirksamen Umsetzung der EU-Finanzdienstleistungsvorschriften beitragen könnten.

Der Vorschlag entspricht dem Ansatz, der in der Mitteilung „Auf dem Weg zu einer europäischen Strafrechtspolitik – Sicherstellung der wirksamen Umsetzung der EU-Politik durch das Strafrecht" vom 20. September 2011[3] dargelegt ist. Dazu zählt eine faktengestützte Bewertung der vorhandenen nationalen Durchsetzungsregelungen und des Mehrwerts gemeinsamer strafrechtlicher Mindestvorschriften der EU, wobei die Grundsätze der Notwendigkeit, Verhältnismäßigkeit und Subsidiarität berücksichtigt wurden.

Im Einklang mit dem „Stockholmer Programm" und den Schlussfolgerungen des Rats „Justiz und Inneres" zur Verhinderung von Wirtschaftskrisen und die Unterstützung der Wirtschaftstätigkeit vom 22. April 2010[4] hat die Europäische Kommission die Anwendung der nationalen Rechtsvorschriften zur Umsetzung der Marktmissbrauchsrichtlinie geprüft und dabei einige Probleme festgestellt, die die Marktintegrität und den Anlegerschutz beeinträchtigen. Dazu zählt die Tatsache, dass die derzeit verfügbaren Sanktionen zur Bekämpfung von Marktmissbrauch nicht wirkungsvoll und abschreckend genug sind, so dass die Richtlinie nicht wirksam durchgesetzt werden kann. Zudem ist in den einzelnen Mitgliedstaaten ganz unterschiedlich definiert, welche Fälle des Insiderhandels oder der Marktmanipulation als Straftaten zu betrachten sind. Beispielsweise sind in fünf Mitgliedstaaten für die Weitergabe von Insider-Informationen durch Primärinsider keine strafrechtlichen Sanktionen vorgesehen, und in acht Mitgliedstaaten gibt es keine entsprechenden Sanktionen für die Weitergabe durch Sekundärinsider. In einem Mitgliedstaat sind gegenwärtig keine strafrechtlichen Sanktionen für Insider-Geschäfte durch Primärinsider vorgesehen, und in vier Mitgliedstaaten stehen solche Sanktionen nicht für Marktmanipulation zur Verfügung. Da Marktmissbrauch grenzüberschreitend erfolgen kann, beeinträchtigen diese unterschiedlichen Herangehensweisen den Binnenmarkt und geben Tätern die Möglichkeit, missbräuchliche Praktiken in Ländern durchzuführen, in denen der jeweilige Verstoß nicht strafrechtlich geahndet wird.

Mindestvorschriften in Bezug auf Straftaten und strafrechtliche Sanktionen für Marktmissbrauch, die in nationales Strafrecht umgesetzt und von der Strafjustiz der Mitgliedstaaten angewandt werden, könnten zur Sicherung der Wirksamkeit der EU-Politik beitragen, da sie die gesellschaftliche Missbilligung dieser Taten auf eine

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[3] KOM(2011) 573 endg.

[4] In seinem am 2.12.2009 verabschiedeten „Stockholmer Programm – Ein offenes und sicheres Europa im Dienste und zum Schutz der Bürger" unterstrich der Europäische Rat die Notwendigkeit der Regulierung der Finanzmärkte und der Verhinderung von Missbrauch und forderte die Mitgliedstaaten und die Kommission auf, Marktmissbrauch und Finanzdelikte frühzeitig zu erkennen. Nach den Schlussfolgerungen des Rates „Justiz und Inneres" über die Verhinderung von Wirtschaftskrisen und die Unterstützung der Wirtschaftstätigkeit könnte erwogen werden, ob eine Angleichung der Strafrechtsbestimmungen in Bezug auf schwere Kursmanipulationen und andere missbräuchliche Handlungen im Zusammenhang mit den Wertpapiermärkten möglich und gegebenenfalls angebracht ist. Siehe Dok. 8920/10 vom 22.4.2010 und Dok. 7881/10 vom 29.3.2010.

qualitativ andere Art deutlich machen als verwaltungsrechtliche Sanktionen oder zivilrechtliche Ausgleichsmechanismen. Strafrechtliche Verurteilungen wegen Marktmissbrauchs, die oft mit einer intensiven Medienberichterstattung einhergehen, erhöhen den Abschreckungseffekt, da sie potenziellen Tätern vor Augen führen, dass die Behörden ernsthafte Durchsetzungsmaßnahmen ergreifen, die zu Gefängnisstrafen oder sonstigen strafrechtlichen Sanktionen und einer Eintragung in das Strafregister führen können. Gemeinsame Mindestvorschriften für die Definition der schwersten Formen des Marktmissbrauchs als Straftaten erleichtern die Zusammenarbeit der Durchsetzungsbehörden in der EU, insbesondere da solche Rechtsverstöße oft grenzübergreifend begangen werden.

Auch wenn bereits seit 2003 auf EU-Ebene Vorschriften zur Verhinderung und Bekämpfung von Marktmissbrauch in Kraft sind, hat das System den gewonnenen Erfahrungen zufolge bisher die erwünschte Wirkung – einen wirksamen Beitrag zum Schutz der Finanzmärkte zu leisten – verfehlt. Während die vorgesehene Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation Vorschläge zur Stärkung und Sicherstellung der Kohärenz der verwaltungsrechtlichen Sanktionen enthält, mit denen andere zentrale Probleme des bestehenden Systems behoben werden sollen, werden die Mitgliedstaaten im vorliegenden Vorschlag verpflichtet, Mindestvorschriften für die Definition der schwersten Formen des Marktmissbrauchs als Straftaten sowie für die Mindesthöhe der damit verbundenen strafrechtlichen Sanktionen zu erlassen.

2. ERGEBNISSE DER BERATUNGEN MIT DEN INTERESSIERTEN PARTEIEN UND DER FOLGENABSCHÄTZUNGEN

Diese Initiative ist das Ergebnis von Konsultationen mit allen wichtigen Akteuren, einschließlich Behörden (staatliche Stellen und Wertpapierregulierungsbehörden), Emittenten, Mittler und Anleger.

Sie basiert zudem auf dem vom Ausschuss der Europäischen Wertpapieraufsichtsbehörden (CESR) veröffentlichten Bericht zu den administrativen und strafrechtlichen Maßnahmen und Sanktionen, die in den Mitgliedstaaten gemäß der Marktmissbrauchsrichtlinie verfügbar sind[5]. Berücksichtigt werden ferner die Ergebnisse der Konsultation, die die Kommission im Anschluss an ihre Mitteilung über die Stärkung der Sanktionsregelungen im Finanzdienstleistungssektor durchgeführt hat.

Am 12. November 2008 veranstaltete die Europäische Kommission eine öffentliche Konferenz zur Überprüfung der Rechtsvorschriften zum Marktmissbrauch[6]. Am 20. April 2009 leitete die Europäische Kommission eine Sondierung zur Überprüfung der Marktmissbrauchsrichtlinie ein. Dabei gingen 85 Beiträge bei den Kommissionsdienststellen ein. Die nicht vertraulichen Stellungnahmen können auf der Website der Kommission eingesehen werden[7].

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5 CESR/08-099 Februar 2008.

6 Siehe http://ec.europa.eu/internal_market/securities/abuse/12112008_conference_de.htm.

7 Siehe http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm.

Am 28. Juni 2010 leitete die Kommission eine öffentliche Konsultation zur Überarbeitung der Richtlinie ein, die am 23. Juli 2010 abgeschlossen wurde[8]. Dabei gingen 96 Beiträge bei den Kommissionsdienststellen ein. Die nicht vertraulichen Stellungnahmen können auf der Website der Kommission eingesehen werden[9]. Anhang 2 der Folgenabschätzung enthält eine Zusammenfassung[10]. Am 2. Juli 2010 veranstaltete die Europäische Kommission eine weitere öffentliche Konferenz zur Überprüfung der Marktmissbrauchsrichtlinie[11].

Im Rahmen ihrer Politik einer besseren Rechtsetzung hat die Kommission eine Folgenabschätzung vorgenommen, in deren Rahmen verschiedene Handlungsalternativen analysiert wurden. Bei diesen Vorbereitungsmaßnahmen wurden auch politische Optionen hinsichtlich strafrechtlicher Sanktionen erwogen. In der Folgenabschätzung gelangte die Kommission zu dem Schluss, dass eine Verpflichtung der Mitgliedstaaten, strafrechtliche Sanktionen für die schwersten Formen des Marktmissbrauchs einzuführen, wesentlich zu einer wirksamen Umsetzung der EU-Politik im Bereich des Marktmissbrauchs beitragen kann. In Kombination mit den in der vorgeschlagenen Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation vorgesehenen politischen Maßnahmen dürfte sich dies positiv auf das Anlegervertrauen auswirken und die Stabilität der Finanzmärkte weiter verbessern.

3. RECHTLICHE ASPEKTE DES VORSCHLAGS

3.1. Rechtsgrundlage

Dieser Vorschlag stützt sich auf Artikel 83 Absatz 2 AEUV.

3.2. Subsidiarität und Verhältnismäßigkeit

Nach dem Subsidiaritätsprinzip (Artikel 5 Absatz 3 EU-Vertrag) wird die Union nur tätig, sofern und soweit die angestrebten Ziele auf Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können und daher wegen ihres Umfangs oder ihrer Wirkungen besser auf EU-Ebene zu verwirklichen sind.

Marktmissbrauch kann grenzübergreifend erfolgen und beeinträchtigt die Integrität der zunehmend integrierten Finanzmärkte in der EU. Die unterschiedlichen Herangehensweisen der Mitgliedstaaten an die Verhängung von Sanktionen für Marktmissbrauch geben möglichen Tätern die Möglichkeit, Verstöße dort zu begehen, wo die Sanktionen am wenigsten streng sind. Dies beeinträchtigt sowohl die abschreckende Wirkung der nationalen Sanktionsregelungen als auch die Durchsetzung des EU-Rechtsrahmens zur Bekämpfung des Marktmissbrauchs. EU-weite Mindestvorschriften zu den Arten des Marktmissbrauchs, die als Straftaten anzusehen sind, könnten zur Behebung dieses Problems beitragen.

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8 Siehe http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf.
9 Siehe http://ec.europa.eu/internal_market/consultations/2010/mad_en.htm.
10 Der Folgenabschätzungsbericht findet sich unter http://ec.europa.eu/internal_market/securities/abuse/index_de.htm.
11 Eine Zusammenfassung der Diskussionen ist in Anhang 3 der Folgenabschätzung enthalten.

Vor diesem Hintergrund erscheinen Maßnahmen auf EU-Ebene im Sinne des Grundsatzes der Subsidiarität als angebracht.

Nach dem Grundsatz der Verhältnismäßigkeit müssen Maßnahmen gezielt sein und dürfen nicht über das zur Erreichung der Ziele erforderliche Maß hinausgehen. An diesem Grundsatz orientierte sich der gesamte Prozess von der Ermittlung und Bewertung alternativer politischer Optionen bis zur Abfassung dieses Vorschlags.

3.3. Einzelerläuterung zum Vorschlag

3.3.1. Straftaten

In Artikel 3 in Verbindung mit Artikel 2 des vorliegenden Vorschlags ist dargelegt, welche Rechtsverstöße im Bereich des Marktmissbrauchs von den Mitgliedstaaten als Straftaten betrachtet und daher strafrechtlich geahndet werden sollten.

Zwei Arten missbräuchlichen Verhaltens, nämlich Insider-Geschäfte und Marktmanipulation, sollten als Straftaten gelten, wenn sie vorsätzlich begangen werden. Versuchte Insider-Geschäfte und Marktmanipulation sollten ebenfalls strafrechtlich geahndet werden können.

Der Straftatbestand der Insider-Geschäfte sollte sich auf Personen beschränken, die Insider-Informationen besitzen, von denen sie wissen, dass es sich um Insider-Informationen handelt. Der Straftatbestand der Marktmanipulation ist nicht auf einen bestimmten Personenkreis beschränkt.

3.3.2. Anstiftung, Beihilfe und Versuch

Artikel 4 stellt sicher, dass auch Anstiftung und Beihilfe zu diesen Straftaten in den Mitgliedstaaten strafrechtlich geahndet werden können. Der Versuch, eine der in den Artikeln 3 und 4 definierten Straftaten zu begehen, wird ebenfalls von der Richtlinie erfasst, mit Ausnahme einer nicht ordnungsgemäßen Weitergabe von Insider-Informationen und der Verbreitung von Informationen, die falsche oder irreführende Signale aussenden, da eine Einstufung solcher Versuche als Straftaten nicht als angemessen erschiene.

3.3.3. Strafrechtliche Sanktionen

In Artikel 5 werden die Mitgliedstaaten verpflichtet, die notwendigen Maßnahmen zu ergreifen, um sicherzustellen, dass die in den Artikeln 3 und 4 definierten Straftaten strafrechtlichen Sanktionen unterliegen. Die Sanktionen sollten wirksam, verhältnismäßig und abschreckend sein.

3.3.4. Verantwortlichkeit juristischer Personen

Artikel 6 verpflichtet die Mitgliedstaaten, dafür zu sorgen, dass juristische Personen für die in den Artikeln 3 und 4 definierten Straftaten zur Verantwortung gezogen werden können.

4. AUSWIRKUNGEN AUF DEN HAUSHALT

Der Vorschlag hat keine Auswirkungen auf den Haushalt der Europäischen Union.

2011/0297 (COD)

Vorschlag für

RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES

über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION –

gestützt auf den Vertrag über die Arbeitsweise der Europäischen Union, insbesondere auf Artikel 83 Absatz 2,

auf Vorschlag der Europäischen Kommission,

nach Zuleitung des Entwurfs des Gesetzgebungsakts an die nationalen Parlamente,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses[12],

gemäß dem ordentlichen Gesetzgebungsverfahren,

in Erwägung nachstehender Gründe:

(1) Ein integrierter und effizienter Finanzmarkt setzt Marktintegrität voraus. Das reibungslose Funktionieren der Wertpapiermärkte und das Vertrauen der Öffentlichkeit in die Märkte sind Voraussetzungen für Wirtschaftswachstum und Wohlstand. Marktmissbrauch verletzt die Integrität der Finanzmärkte und untergräbt das Vertrauen der Öffentlichkeit in Wertpapiere und Derivate.

(2) Gemäß der Richtlinie 2003/6/EG des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation (Marktmissbrauch)[13] müssen die Mitgliedstaaten sicherstellen, dass die zuständigen Behörden über die für die Aufdeckung und Untersuchung von Marktmissbrauch erforderlichen Befugnisse verfügen. Unbeschadet des Rechts der Mitgliedstaaten zur Verhängung strafrechtlicher Sanktionen müssen die Mitgliedstaaten gemäß der Richtlinie 2003/6/EG zudem dafür sorgen, dass gegen die Verursacher von Verstößen gegen die nationalen Vorschriften zur Umsetzung der Richtlinie Verwaltungsmaßnahmen getroffen oder verwaltungsrechtliche Sanktionen verhängt werden können.

(3) Gemäß dem Bericht der hochrangigen Gruppe zu Fragen der EU-Finanzaufsicht muss sich ein solider Rahmen für Aufsicht und Unternehmensführung im Finanzsektor auf eine wirkungsvolle Aufsichts- und Sanktionsordnung stützen können.Nach Ansicht der Gruppe sollten die Aufsichtsbehörden dazu mit ausreichenden Handlungsbefugnissen ausgestattet sein und auf

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[12] ABl. C […] vom […], S. […].
[13] ABl. L 16 vom 12.4.2003, S. 16.

gleichwertige, starke und abschreckende Sanktionsregelungen für alle Rechtsverstöße im Finanzbereich zurückgreifen können, die wirksam durchgesetzt werden sollten. Den Schlussfolgerungen der Gruppe zufolge sind die Sanktionsregelungen der Mitgliedstaaten jedoch generell schwach und heterogen.

(4) Ein gut funktionierender Rechtsrahmen zur Bekämpfung des Marktmissbrauchs bedarf einer wirksamen Umsetzung. Eine Prüfung der nationalen Regelungen zu verwaltungsrechtlichen Sanktionen im Rahmen der Richtlinie 2003/6/EG ergab, dass nicht alle zuständigen nationalen Behörden über sämtliche erforderlichen Befugnisse verfügen, um Fälle von Marktmissbrauch angemessen ahnden zu können. Insbesondere sind nicht in allen Mitgliedstaaten Geldbußen für Insider-Geschäfte und Marktmanipulation vorgesehen, und die Höhe dieser Sanktionen variiert in den einzelnen Mitgliedstaaten beträchtlich.

(5) Die Einführung verwaltungsrechtlicher Sanktionen durch die Mitgliedstaaten hat sich nicht als ausreichend erwiesen, um die Einhaltung der Vorschriften zur Verhinderung und Bekämpfung von Marktmissbrauch sicherzustellen.

(6) Es ist daher unverzichtbar, die Einhaltung der Vorschriften durch die Einführung von strafrechtlichen Sanktionen zu unterstützen, die die gesellschaftliche Missbilligung auf eine qualitativ andere Art deutlich machen als verwaltungsrechtliche Sanktionen. Werden die schwersten Formen des Marktmissbrauchs als Straftaten definiert, so werden klare rechtliche Grenzen gezogen, die ein solches Verhalten als inakzeptabel kennzeichnen und der Öffentlichkeit und möglichen Tätern signalisieren, dass die zuständigen Behörden solche Rechtsverstöße sehr ernst nehmen.

(7) Nicht alle Mitgliedstaaten sehen bisher strafrechtliche Sanktionen für einige Formen schwerer Verstöße gegen die nationalen Rechtsvorschriften zur Umsetzung der Richtlinie 2003/6/EG vor. Diese Unterschiede verringern die Einheitlichkeit der Arbeitsbedingungen im Binnenmarkt und können mögliche Täter dazu verleiten, Marktmissbrauch in Mitgliedstaaten zu begehen, in denen dies nicht strafrechtlich geahndet wird. Zudem gibt es bisher kein EU-weites Einvernehmen darüber, welche Verhaltensweisen als derart schwere Verstöße anzusehen sind. Daher sollten Mindestvorschriften für die Definition von Straftaten, die von natürlichen und juristischen Personen begangen werden, sowie für die Bestimmung der anwendbaren Sanktionen festgelegt werden. Gemeinsame Mindestvorschriften würden darüber hinaus effizientere Ermittlungsmethoden und eine wirksame Zusammenarbeit in und zwischen den Mitgliedstaaten ermöglichen. Eine strafrechtliche Verurteilung wegen Marktmissbrauchs ist oft von einer intensiven Medienberichterstattung begleitet, was auf mögliche Täter abschreckend wirken kann, da dies der Öffentlichkeit die Entschlossenheit der Behörden bei der Bekämpfung des Marktmissbrauchs deutlich macht.

(8) Die Einführung strafrechtlicher Sanktionen für die schwerwiegendsten Verstöße im Bereich des Marktmissbrauchs ist daher für die wirksame Umsetzung der EU-Politik zur Bekämpfung des Marktmissbrauchs von wesentlicher Bedeutung und entspricht den Anforderungen, die in der Mitteilung „Auf dem Weg zu einer europäischen Strafrechtspolitik – Sicherstellung der wirksamen Umsetzung der EU-Politik durch das Strafrecht“[14] dargelegt sind.

[14] KOM(2011) 573 endg.

(9) Um den Anwendungsbereich dieser Richtlinie in Einklang mit dem der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation zu bringen, sollten Transaktionen mit eigenen Aktien, die zur Stabilisierung oder im Rahmen von Rückkaufprogrammen erfolgen, sowie Transaktionen, Aufträge oder Handlungen, die der Geldpolitik oder dem Management öffentlicher Schulden dienen, und Tätigkeiten, die Emissionszertifikate im Rahmen der Klimapolitik der Europäischen Union betreffen, vom Anwendungsbereich dieser Richtlinie ausgenommen werden.

(10) Die Mitgliedstaaten sollten nur dann dazu verpflichtet sein, Insider-Geschäfte und Marktmanipulation im Rahmen der Richtlinie strafrechtlich zu ahnden, wenn diese vorsätzlich begangen wurden.

(11) Angesichts der negativen Wirkung, die versuchte Insider-Geschäfte und Marktmanipulation auf die Integrität der Finanzmärkte und das Anlegervertrauen an diesen Märkten haben, sollten auch Versuche strafbar sein.

(12) Die Richtlinie sollte die Mitgliedstaaten zudem dazu verpflichten, auch die Anstiftung und die Beihilfe zu solchen Straftaten unter Strafe zu stellen. Eine andere Person zu veranlassen, auf der Grundlage von Insider-Informationen davon betroffene Finanzinstrumente zu erwerben oder zu veräußern, sollte in diesem Zusammenhang als Anstiftung zu Insider-Geschäften gelten.

(13) Bei der Anwendung der Richtlinie sollte der mit der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation und seinen Durchführungsmaßnahmen geschaffene Rechtsrahmen berücksichtigt werden.

(14) Im Interesse einer wirksamen Durchführung der mit der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation vorgegebenen europäischen Maßnahmen zur Sicherung der Integrität der Finanzmärkte sollten die Mitgliedstaaten die Verantwortlichkeit auf juristische Personen ausweiten, was weitestmöglich auch für die strafrechtliche Verantwortlichkeit gelten sollte.

(15) Da diese Richtlinie Mindestvorschriften enthält, steht es den Mitgliedstaaten frei, strengere strafrechtliche Bestimmungen zum Marktmissbrauch einzuführen oder beizubehalten.

(16) Die Verarbeitung personenbezogener Daten im Zusammenhang mit der Durchführung dieser Richtlinie sollte nach Maßgabe der Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr[15] erfolgen.

(17) Da das Ziel dieser Richtlinie – die Sicherstellung der Verfügbarkeit strafrechtlicher Sanktionen für die schwersten Formen des Marktmissbrauchs – auf Ebene der Mitgliedstaaten nicht ausreichend erreicht werden kann, sondern wegen des Umfangs und der Wirkungen der Richtlinie besser auf Unionsebene zu verwirklichen ist, kann die Union im Einklang mit dem in Artikel 5 des Vertrags über die Arbeitsweise der Europäischen Union niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Verhältnismäßigkeitsprinzip geht diese Richtlinie nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus.

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15 ABl. L 281 vom 23.11.1995, S. 31.

(18) Diese Richtlinie steht im Einklang mit den Grundrechten und Grundsätzen, die mit der Charta der Grundrechte der Europäischen Union anerkannt wurden und im Vertrag über die Arbeitsweise der Europäischen Union niedergelegt sind. Insbesondere sollte die Anwendung unter angemessener Berücksichtigung der unternehmerischen Freiheit (Artikel 16), des Rechts auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht (Artikel 47), der Unschuldsvermutung und Verteidigungsrechte (Artikel 48), der Grundsätze der Gesetzmäßigkeit und der Verhältnismäßigkeit im Zusammenhang mit Straftaten und Strafen (Artikel 49) und des Rechts, wegen derselben Straftat nicht zweimal strafrechtlich verfolgt oder bestraft zu werden (Artikel 50), erfolgen.

(19) Die Kommission sollte die Umsetzung dieser Richtlinie in den Mitgliedstaaten prüfen und dabei auch berücksichtigen, ob Mindestvorgaben zur Harmonisierung der Arten und Höhe der strafrechtlichen Sanktionen erforderlich sind.

(20) [Gemäß den Artikeln 1, 2, 3 und 4 des Protokolls (Nr. 21) über die Position des Vereinigten Königreichs und Irlands hinsichtlich des Raums der Freiheit, der Sicherheit und des Rechts im Anhang zum Vertrag über die Arbeitsweise der Europäischen Union hat das Vereinigte Königreich mitgeteilt, dass es sich an der Annahme und Anwendung dieser Richtlinie beteiligen will] ODER [Unbeschadet des Artikels 4 des Protokolls (Nr. 21) über die Position des Vereinigten Königreichs und Irlands hinsichtlich des Raums der Freiheit, der Sicherheit und des Rechts im Anhang zum Vertrag über die Arbeitsweise der Europäischen Union beteiligt sich das Vereinigte Königreich nicht an der Annahme dieser Richtlinie und ist daher durch die Richtlinie weder gebunden noch zu ihrer Anwendung verpflichtet].

(21) [Gemäß den Artikeln 1, 2, 3 und 4 des Protokolls (Nr. 21) über die Position des Vereinigten Königreichs und Irlands hinsichtlich des Raums der Freiheit, der Sicherheit und des Rechts im Anhang zum Vertrag über die Arbeitsweise der Europäischen Union hat Irland mitgeteilt, dass es sich an der Annahme und Anwendung dieser Richtlinie beteiligen will] ODER [Unbeschadet des Artikels 4 des Protokolls (Nr. 21) über die Position des Vereinigten Königreichs und Irlands hinsichtlich des Raums der Freiheit, der Sicherheit und des Rechts im Anhang zum Vertrag über die Arbeitsweise der Europäischen Union beteiligt sich Irland nicht an der Annahme dieser Richtlinie und ist daher durch die Richtlinie weder gebunden noch zu ihrer Anwendung verpflichtet].

(22) Gemäß den Artikeln 1 und 2 des Protokolls (Nr. 22) über die Position Dänemarks hinsichtlich des Raums der Freiheit, der Sicherheit und des Rechts im Anhang zum Vertrag über die Arbeitsweise der Europäischen Union beteiligt sich Dänemark nicht an der Annahme dieser Richtlinie und ist daher durch die Richtlinie weder gebunden noch zu ihrer Anwendung verpflichtet –

HABEN FOLGENDE RICHTLINIE ERLASSEN:

Artikel 1
Gegenstand und Anwendungsbereich

1. Diese Richtlinie enthält Mindestvorschriften für strafrechtliche Sanktionen in Bezug auf die schwersten Formen des Marktmissbrauchs, nämlich Insider-Geschäfte und Marktmanipulation.

2. Gemäß Artikel 4 der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation gilt diese Richtlinie nicht für den Handel mit eigenen Aktien im Rahmen von Rückkaufprogrammen und für die Stabilisierung von Finanzinstrumenten, sofern ein solcher Handel im Einklang mit Artikel 3 der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation erfolgt, sowie für Transaktionen, Aufträge oder Handlungen, die der Geldpolitik oder dem Management öffentlicher Schulden dienen oder Emissionszertifikate im Rahmen der Klimapolitik der Europäischen Union betreffen.

3. Diese Richtlinie gilt auch für Handlungen und Transaktionen, einschließlich Geboten, die die Versteigerung von Treibhausgasemissionszertifikaten und anderen darauf beruhenden Auktionsobjekten gemäß der Verordnung (EU) Nr. 1031/2010 betreffen. Alle für Geschäftsaufträge geltenden Bestimmungen dieser Richtlinie gelten auch für Gebote im Rahmen einer Versteigerung.[16]

Artikel 2
Begriffsbestimmungen

Für die Zwecke dieser Richtlinie gelten folgende Begriffsbestimmungen:

1. „Finanzinstrument“ bezeichnet jedes Instrument im Sinne von Artikel 2 Absatz 1 Nummer 8 der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Märkte für Finanzinstrumente.

2. „Insider-Informationen“ bezeichnet Informationen im Sinne von Artikel 6 der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation.

Artikel 3
Insider-Geschäfte

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass die folgenden Handlungen Straftaten darstellen, wenn sie vorsätzlich begangen werden:

a) Nutzung von Insider-Informationen zum Erwerb oder zur Veräußerung von Finanzinstrumenten, auf die sich die Informationen beziehen, durch Personen, die sich im Besitz dieser Informationen befinden, für eigene oder fremde Rechnung. Dazu zählt auch die Änderung oder Stornierung eines Auftrags in Bezug auf das Finanzinstrument, auf das sich die Informationen beziehen, wenn der Auftrag vor Erlangen der Insider-Informationen erteilt wurde; oder

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[16] Verordnung (EU) Nr. 1031/2010 der Kommission vom 12. November 2010 über den zeitlichen und administrativen Ablauf sowie sonstige Aspekte der Versteigerung von Treibhausgasemissionszertifikaten gemäß der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft, ABl. L 302 vom 18.11.2010, S. 1.

b) Weitergabe von Insider-Informationen an Dritte, soweit dies nicht rechtmäßig im Rahmen der beruflichen oder geschäftlichen Pflichterfüllung erfolgt.

Artikel 4
Marktmanipulation

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass die folgenden Handlungen Straftaten darstellen, wenn sie vorsätzlich begangen werden:

a) Aussenden falscher oder irreführender Signale hinsichtlich des Angebots oder des Kurses eines Finanzinstruments oder damit verbundenen Waren-Spot-Kontrakts oder der Nachfrage danach;

b) Beeinflussung des Kurses eines oder mehrerer Finanzinstrumente oder eines damit verbundenen Waren-Spot-Kontrakts, um ein anormales oder künstliches Kursniveau zu erzielen;

c) Abschluss einer Transaktion, Erteilung eines Kauf- oder Verkaufsauftrags und jegliche sonstige Tätigkeit an Finanzmärkten, die den Kurs eines oder mehrerer Finanzinstrumente oder eines damit verbundenen Waren-Spot-Kontrakts beeinflusst, unter Vorspiegelung falscher Tatsachen oder unter Verwendung sonstiger Kunstgriffe oder Formen der Täuschung;

d) Verbreitung von Informationen, die falsche oder irreführende Signale hinsichtlich Finanzinstrumenten oder mit diesen verbundenen Waren-Spot-Kontrakten aussenden, sofern die betreffenden Personen durch die Verbreitung dieser Informationen einen Vorteil oder Gewinn für sich selbst oder für Dritte erzielen.

Artikel 5
Anstiftung, Beihilfe und Versuch

3. Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass Anstiftung und Beihilfe zu den in den Artikeln 3 und 4 genannten Straftaten ebenfalls strafrechtlich geahndet werden können.

4. Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass der Versuch, eine Straftat gemäß Artikel 3 Buchstabe a und Artikel 4 Buchstabe a, b und c zu begehen, strafrechtlich geahndet werden kann.

Artikel 6
Strafrechtliche Sanktionen

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass die Straftaten im Sinne der Artikel 3 bis 5 auf wirksame, angemessene und abschreckende Weise strafrechtlich geahndet werden können.

Artikel 7
Verantwortlichkeit juristischer Personen

1. Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass juristische Personen für die in den Artikeln 3 bis 5 genannten Straftaten zur Verantwortung gezogen werden können, wenn eine solche Straftat zu ihren Gunsten von einer Person begangen wurde, die entweder allein oder als Teil eines Organs der juristischen Person gehandelt hat und aufgrund einer der folgenden Befugnisse eine leitende Stellung innerhalb der juristischen Person innehat:

   a) die Befugnis zur Vertretung der juristischen Person,

   b) die Befugnis, Entscheidungen im Namen der juristischen Person zu treffen, oder

   c) eine Kontrollbefugnis innerhalb der juristischen Person.

2. Die Mitgliedstaaten treffen zudem die erforderlichen Maßnahmen, um sicherzustellen, dass juristische Personen zur Verantwortung gezogen werden können, wenn mangelnde Überwachung oder Kontrolle durch eine Person im Sinne des Absatzes 1 es einer ihr unterstellten Person ermöglicht hat, eine der in den Artikeln 3 und 5 genannten Straftaten zugunsten der juristischen Person zu begehen.

3. Die Verantwortlichkeit juristischer Personen nach den Absätzen 1 und 2 schließt die strafrechtliche Verfolgung natürlicher Personen als Täter, Anstifter oder Gehilfen bei in den Artikeln 3 bis 5 genannten Straftaten nicht aus.

Artikel 8
Sanktionen gegen juristische Personen

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass gegen im Sinne von Artikel 7 verantwortliche juristische Personen wirksame, angemessene und abschreckende Sanktionen verhängt werden können.

Artikel 9
Bericht

Die Kommission berichtet dem Europäischen Parlament und dem Rat bis zum [4 Jahre nach dem Inkrafttreten der Richtlinie] über die Anwendung dieser Richtlinie und erforderlichenfalls über die Notwendigkeit einer Überarbeitung und berücksichtigt dabei insbesondere, ob gemeinsame Mindestvorschriften für die Arten und Höhe der strafrechtlichen Sanktionen eingeführt werden sollten.

Gegebenenfalls legt die Kommission ihren Bericht gemeinsam mit einem Legislativvorschlag vor.

Artikel 10
Umsetzung

1. Die Mitgliedstaaten erlassen und veröffentlichen bis spätestens [24 Monate nach Inkrafttreten dieser Richtlinie] die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie nachzukommen. Sie teilen der Kommission den Wortlaut dieser Vorschriften unverzüglich mit und übermitteln ihr zugleich eine Entsprechungstabelle zwischen den genannten Vorschriften und dieser Richtlinie.

   Sie wenden diese Vorschriften vorbehaltlich des Inkrafttretens der Verordnung (EU) Nr. … des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation ab dem [24 Monate nach Inkrafttreten dieser Richtlinie] bzw. ab dem Tag des Inkrafttretens dieser Verordnung an.

   Bei Erlass dieser Vorschriften nehmen die Mitgliedstaaten in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten dieser Bezugnahme.

2. Die Mitgliedstaaten teilen der Kommission den Wortlaut der wichtigsten nationalen Rechtsvorschriften mit, die sie auf dem unter diese Richtlinie fallenden Gebiet erlassen und fügen eine Tabelle der Entsprechungen zwischen der Richtlinie und diesen nationalen Rechtsvorschriften bei.

Artikel 12
Inkrafttreten

Diese Richtlinie tritt am zwanzigsten Tag nach ihrer Veröffentlichung im Amtsblatt der Europäischen Union in Kraft.

Artikel 13
Adressaten

Diese Richtlinie ist gemäß den Verträgen an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am

Im Namen des Europäischen Parlaments	*Im Namen des Rates*
Der Präsident	*Der Präsident*

COUNCIL OF THE EUROPEAN UNION

Brussels, 25 October 2011

Interinstitutional File: 2011/0297 (COD)

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COVER NOTE

from:	Secretary-General of the European Commission, signed by Mr. Jordi AYET PUIGARNAU, Director
date of receipt:	21 October 2011
to:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No Cion doc.:	SEC(2011) 1217 final
Subject:	COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on insider dealing market manipulation (market abuse) and the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on criminal sanctions for insider dealing and market manipulation

Delegations will find attached Commission document SEC(2011) 1217 final.

Encl.: SEC(2011) 1217 final

EUROPEAN COMMISSION

Brussels, 20.10.2011
SEC(2011) 1217 final

COMMISSION STAFF WORKING PAPER

IMPACT ASSESSMENT

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on insider dealing market manipulation (market abuse)

and the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on criminal sanctions for insider dealing and market manipulation

{COM(2011) 651 final}
{SEC(2011) 1218 final}

COMMISSION STAFF WORKING PAPER

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1. INTRODUCTION

Adopted in early 2003, the Market Abuse Directive (MAD)[1] has introduced a comprehensive framework to tackle insider dealing and market manipulation practices, jointly referred to as "market abuse". The Directive aims to increase investor confidence and market integrity by prohibiting those who possess inside information from trading in related financial instruments, and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades which secure prices at abnormal levels.

The importance of market integrity has been highlighted by the current global economic and financial crisis. In this context, the Group of Twenty (G20) agreed to strengthen financial supervision and regulation and to build a framework of internationally agreed high standards. In line with the G20 findings, the report by the High-Level Group on Financial Supervision in the EU recommended that "a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes".

The importance of the efficient functioning of the MAD was underlined in the Commission Communication "Driving European recovery"[2]**,** which intends to tackle the most important shortcomings in the markets that have been observed in the current financial crisis. The current review of the MAD therefore focuses on how to enhance the protections offered by this Directive in terms of market integrity and investor protection, and the sanctions available to effectively enforce them on the one hand, and the reduction where possible of administrative burdens on the other hand. In its Communication on "Ensuring efficient, safe and sound derivatives markets: Future policy actions" the Commission undertook to extend relevant provisions of the MAD in order to cover derivatives markets in a comprehensive fashion[3]. The importance of efficient coverage of OTC transactions in derivatives has been stressed also in discussions at various international fora[4] including the G 20 and IOSCO as well as in the recent US Treasury Financial Regulatory Reform programme[5].

The European Commission has assessed the application of the Market Abuse Directive and has put forward suggestions for its review aiming at clarifying some of its provisions and increasing its effectiveness[6]. Furthermore, the Commission Communication on a Small Business Act for Europe calls on the EU and Member States to design rules according to the "think small first principle" by reducing administrative burdens, adapting legislation to the

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1 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003, on insider dealing and market manipulation. OJ L, 12 April2003, p 16.

2 COM (2009)114 of 4th March 2009.

3 COM(2009) 563 final, 20.10.2009

4 IOSCO notes that *"The high level of interconnectivity between credit derivatives, the obligations of the underlying reference entities e.g., corporate bonds, equities and cash markets means market misconduct (manipulation and insider trading) and disruptions in one market can affect another.", Consultation Report on Unregulated Markets and Products, May 2009, p. 28.*

5 *"Market integrity concerns should be addressed by making whatever amendments to the CEA and the securities laws which are necessary to ensure that the CFTC and the SEC, consistent with their respective missions, have clear, unimpeded authority to police and prevent fraud, market manipulation, and other market abuses involving all OTC derivatives." Financial Regulatory Reform. A New Foundation: Rebuilding Financial Supervision and Regulation, Dept. of Treasury, June 2009. p.48;*

6 See notably the consultation document on the review of the MAD, published on 28 June 2010.

needs of SMEs and facilitating the access to finance of SMEs[7]. A review of existing sanctioning powers and their practical application aimed at promoting convergence of sanctions across the range of supervisory activities has been carried out in the Commission Communication on sanctions in the financial services sector[8].

It is important to note that this initiative is not the only one to address problems in relation to the transparency and integrity of markets. For details of other related initiatives see annex 1.

This document is the impact assessment accompanying the initiative for the review of the market abuse Directive. It does not pre-judge the final form of any decision to be taken by the European Commission.

2. PROCEDURE

The initiative is the result of an evaluation of the effectiveness of the Market Abuse Directive and possible options for its review, based on a call for evidence, a public consultation and two public hearings with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and individual and institutional investors) and consumers. The evaluation of the MAD takes into consideration the reports published by the Committee of European Securities Regulators (CESR)[9], the joint report of CESR and the European Regulators Group for Energy and Gas (ERGEG)[10] and the report of the European Securities Markets Expert Group (ESME)[11]. As part of the evaluation, a report was commissioned by external consultants on the administrative burdens associated with the Directive and possible options to revise it[12].

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7 COM(2008)394 final, Commission Communication *"Think Small First" A "Small Business Act" for Europe*, 25.6.2008.

8 Commission Communication on reinforcing sanctions regimes in the financial services sector, COM(2010) 71 final, 8.12.2010

9 CESR is an independent advisory group to the European Commission composed by the national supervisors of the EU securities markets. See the European Commission's Decision of 23 January 2009 establishing the Committee of European Securities Regulators 2009/77/CE. OJ L25, 23.10.2009, p. 18). The role of CESR is to improve co-ordination among securities regulators, act as an advisory group to assist the EU Commission and to ensure more consistent and timely day-to-day implementation of community legislation in the Member States.

10 ERGEG is the European Commission's formal advisory group of energy regulators. ERGEG was established by the European Commission, in November 2003, to assist the Commission in creating a single-EU market for electricity and gas. ERGEG's members are the heads of the national energy regulatory authorities in the 27 EU Member States.

11 ESME is an advisory body to the Commission, composed of securities markets practitioners and experts, whose mandate expired at the end of 2009 and was not renewed. It was established by the Commission in April 2006 and operated on the basis of the Commission Decision 2006/288/EC of 30 March 2006 setting up a European Securities Markets Expert Group to provide legal and economic advice on the application of the EU securities Directives (OJ L 106, 19.4.2006, p. 14–17).

12 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010. See annex.

2.1. CESR and ESME reports

CESR has published reports evaluating the nature and extent of the supervisory powers of Member States under the Market Abuse Directive[13] and the options and discretions of the MAD regime used by Member States[14].

The ESME report[15] evaluates the effectiveness of the MAD in achieving its primary objectives, identifies certain weaknesses and problems and sets out suggested improvements.

The CESR/ERGEG report[16] addresses the specific question of knowing if the scope of the MAD is such as to properly address market integrity issues in the electricity and gas markets.

2.2. Public consultation

On 12 November 2008 the European Commission held a public conference on the review of the market abuse regime[17]. On 20 April 2009, the European Commission launched a call for evidence on the review of the Market Abuse Directive. The Commission services received 85 contributions. The non-confidential contributions can be consulted in the Commission website[18].

On 28 June 2010 the Commission launched a public consultation on the revision of the Directive which closed on 23 July 2010[19]. The Commission services received 96 contributions. The non-confidential contributions can be consulted in the Commission website and a summary is found in annex 2[20]. On 2 July 2010, the Commission held a further public conference on the review of the Directive[21].

2.3. Steering Group

The Steering Group for this Impact Assessment was formed by representatives of a number of services of the European Commission, namely the Directorate General Internal Market and Services, the Directorate General Competition, the Directorate General Economic and Financial Affairs, the Directorate General Enterprise, the Directorate General for Health and Consumers, the Directorate General Justice, the Directorate General Information Society and Media, the Directorate General Climate, the Directorate General Energy, the Directorate General Agriculture, the Legal Service and the Secretariat General. This Group met three times, in June 2009, in October 2010 and December 2010. The contributions of the members

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13 Ref. CESR/07-380, June 2007, available at www.cesr-eu.org.
14 Ref CESR/09-1120.
15 Issued in June 2007 and entitled *"market abuse EU legal framework and its implementation by Member States: a first evaluation"*;
16 "CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F20 - Market Abuse".
17 See http://ec.europa.eu/internal_market/securities/abuse/12112008_conference_en.htm.
18 See http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm
19 See http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf
20 See http://ec.europa.eu/internal_market/consultations/2010/mad_en.htm
21 See annex 3 for a summary of the discussions.

of the Steering Group have been taken into account in the content and shape of this impact assessment[22].

2.4. Impact Assessment Board

DG MARKT services met the Impact Assessment Board on 23 February 2011. The Board analysed this Impact Assessment and delivered its opinion on 25 February 2011. During this meeting the members of the Board provided DG MARKT services with comments to improve the content of the Impact Assessment that led to some modifications to the text. These are:

– Clarification of how the performance of the existing legislation has been evaluated and how the evaluation results have informed the analysis of the problem;

– The addition of evidence-based estimates of the overall damage to the European economy as a consequence of abusive practices in the markets under consideration, and of the estimated overall benefits of the preferred policy options, with the necessary caveats regarding the interpretation of these estimates;

– Clarification in the baseline scenario of how other related financial regulations complement the Market Abuse Directive;

– Clarification of the content of certain policy options and improved presentation of the packages of preferred options, as well as an assessment of the overall impacts of the packages of preferred options, taking into account synergies or trade-offs between different options where they exist;

– A more proportionate analysis of the most costly measures in the assessment of the administrative burdens and costs;

– The addition in the main text of more clearly visible, concise summaries of the assessment of impacts of policy options in terms of fundamental rights, especially in the areas of investigative powers and sanctions;

– An improved justification of why the approximation of criminal law is essential for an effective EU policy on market abuse, based on studies and evidence from Member States about the effectiveness of criminal sanctions, as well as a summary of the responses to the Commission Communication on reinforcing sanctioning regimes in the financial services sector; and

– A clearer presentation in the main text of the views of stakeholders, including institutional and individual investors, on the policy options.

[22] In accordance with the rules for the elaboration of impact assessments the minutes of the last meeting of the steering group have been submitted to the Impact Assessment Board together with this impact assessment.

3. PROBLEM DEFINITION, BASELINE SCENARIO AND SUBSIDIARITY

3.1. Background and context

3.1.1. What is market abuse? The current legislative framework

The Market Abuse Directive aims to increase investor confidence and market integrity by prohibiting those who possess inside information from trading in related financial instruments ("insider trading"), and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades which secure prices at abnormal levels ("market manipulation"). The glossary in annex 5 provides explanations of key terms, including insider dealing and market manipulation, used in the Market Abuse Directive.

Scope of the current Market Abuse Directive

If an instrument is admitted to trading on a regulated market then any trading in that instrument is covered by the MAD, whether the trading of that instrument occurs on a MTF, "crossing network"[23] or over-the-counter (OTC). Further, for insider dealing (although not for market manipulation), the prohibition extends also to financial instruments not admitted to trading on a regulated market, but whose value depends on such a financial instrument.

The diagram below provides an overview of the scope of the MAD.

[23] A crossing network is an alternative trading system that matches buy and sell orders electronically for execution without first routing the order to an exchange or other organised market which displays a public quote.

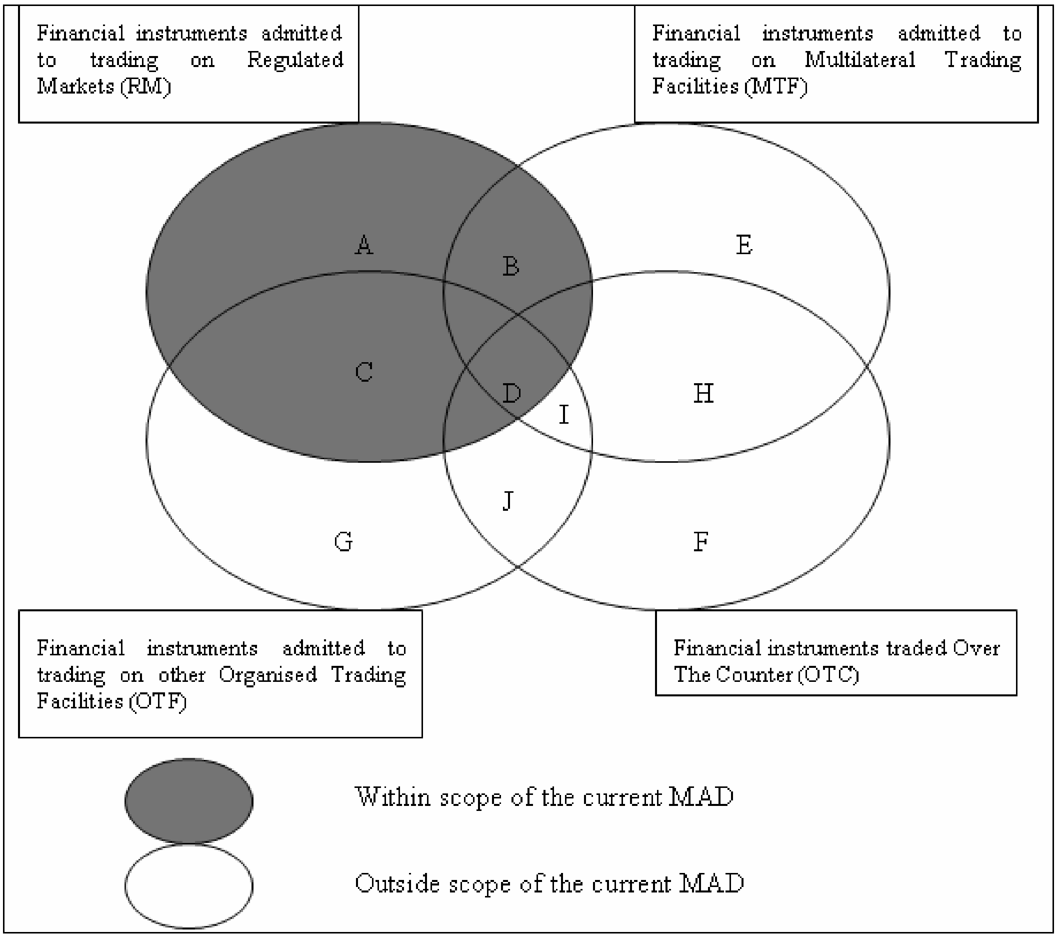


Diagram: Scope of the existing MAD

Financial instruments are defined in Annex I Section C of the Markets in Financial Instruments Directive (MiFID)[24].

Whether the MAD applies to the trading of a financial instrument depends solely on whether or not that instrument has been admitted to trading on a regulated market (hereafter referred to as RM), irrespective of where that instrument is traded. Therefore, instruments admitted to trading on a regulated market are covered by the current MAD (point A in the diagram). Furthermore, an instrument will fall within the scope of the current MAD if it is admitted to trading on a regulated market, but traded for example:

- on a Multilateral Trading Facility (MTF) (point B in the diagram), or
- on another organised trading facility (point C in the diagram) or
- Over The Counter (OTC) (point D).

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24 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ L 145, 30.4.2004.

On the other hand, instruments which are not admitted to trading on a regulated market fall outside the scope of the current MAD, for example if they are:

- only admitted to trading on an MTF (point E in the diagram), or
- only traded OTC (point F), or
- only traded on another organised trading facility (point G);
- this is also the case for the other remaining combinations of instruments, places of admission to trading and trading (points H, I and J).

The only exception to this rule is that the insider trading prohibition also applies to financial instruments not admitted to trading on a regulated market but whose value depends on a financial instrument admitted to trading on a regulated market (for example, an equity derivative not admitted to trading on a regulated market which has as an underlying a share admitted to trading on a regulated market).

What is market abuse?

The definitions of market manipulation are deliberately drafted in general terms in the MAD, albeit with more detailed provisions set out in implementing measures, so that they can be adapted to new manipulative techniques which may develop in light of technological and market developments.

However, fundamentally market abuse may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly, by others who:

- have used information which is not publicly available to trade in financial instruments to their advantage (insider dealing);
- have distorted the price-setting mechanism of financial instruments; or
- have disseminated false or misleading information.

Under these broad categories fall a number of detailed abusive practices, such as "spoofing", the spreading of rumours and the manipulation of commodity supply chains; a glossary containing examples of some of the common practices is found in annex 5.

How is market abuse detected and sanctioned?

The MAD creates some tools to prevent and detect market abuses, like insiders' lists, suspicious transaction reports and the disclosure of managers' share transactions. It also obliges issuers of financial instruments traded on a regulated market to make public as soon as possible inside information that they possess, with limited possibilities to delay.

In order to promote enforcement, the Directive gives national competent authorities powers of investigation (such as access to data or on-site inspections) and the power to take administrative measures or impose "effective, proportionate and dissuasive" sanctions.

The MAD is accompanied by implementing measures which consist of three Commission Directives and a Commission Regulation. The first, Commission Directive 2003/124/EC specifies the definitions of inside information and market manipulation and the conditions under which inside information must be disclosed to the public[25]. The second, Commission Directive 2003/125/EC sets out the conditions for the fair presentation of investment recommendations and the disclosure of conflicts of interest[26]. The third, Commission Regulation 2273/2003 specifies the Directive in respect of exemptions for buy-back programmes and the stabilisation of financial instruments[27]. The fourth, Commission Directive 2004/72/EC, specifies the Directive in relation to accepted market practices, inside information for commodity derivatives, insider lists, managers' transaction reports and suspicious transaction reports[28].

3.1.2. Nature and size of the market concerned

A detailed breakdown of the markets is contained in Annex 4. Below is presented a high level summary of key market segments.

Equity markets

Since the MAD was adopted in 2003, financial markets have continued to evolve, most notably in terms of market infrastructure and the types of products traded[29]. Today, European equity trading predominantly takes place on regulated markets, bilaterally between institutions (over the counter - OTC) and on multilateral trading facilities (MTFs); to a lesser extent equities are also traded on broker crossing networks and systematic internalisers (SIs). Both MTFs and SIs were introduced by MiFID in 2007, and as such were not specifically provided for in the MAD. While equity MTFs have undergone large growth, and now occupy a significant proportion of the European equity market turnover, SIs have not seen as significant growth; there are currently 138 MTFs and 12 SIs operating in Europe[30].

In March 2011 total equity trading volume on European markets was in the region of €1,885 billion[31]. Of this, approximately 52% was conducted on traditional stock exchanges, 14% on MTFs and 34% via bilateral OTC arrangements, which includes SI's (at about 2%) – see chart 1 below.[32] In other words, the current MAD regime applies to all the trading on stock exchanges, but only covers trade on MTF's and OTC where the instrument is

25 Commission Directive 2003/124/EC of 22.12.2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

26 Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest

27 Commission Regulation (EC)2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

28 Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

29 For a glossary explaining key terms used in this report see annex 5.

30 CESR MiFID database, http://mifiddatabase.cesr.eu/

31 Thomson Reuters Monthly Market Share Report, March 2011.

32 It is noted that OTC refers to a broad range of trading, ranging from pure bilateral trading (considered more traditional OTC), to more organised arrangements (such as OTC initiated through a traditional exchange, SIs or broker networks). CESR estimates show that broker crossing networks and SIs do not form a significant form of total equity trading, accounting for about 2% of total volume each.

listed on a regulated market. It should be noted that in 2010, total trading in EEA shares amounted to €18.7 trillion in 2010 with OTC trading accounting for 37%[33].

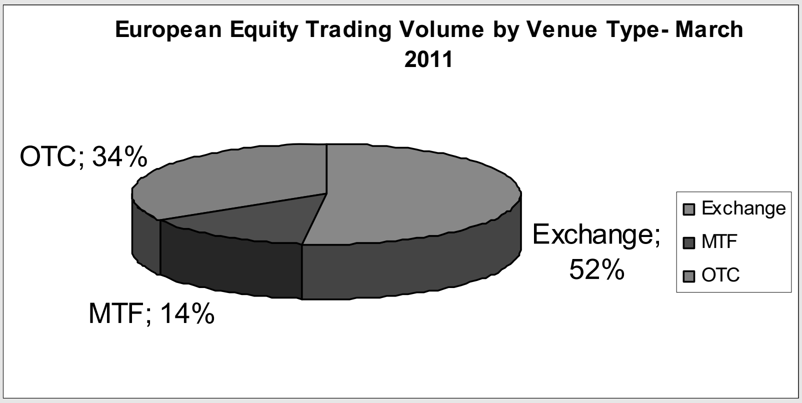


Chart 1[34]

Debt Markets

In terms of debt outstanding, non-government institutions raised a total of $8,604.8 billion on the domestic (European) debt Market and $14,761.3 billion on the international debt market as of December 2009[35].

Unlike equity markets, non government debt markets have longer term objectives and investors more commonly buy and then hold securities to maturity; as such, most European debt trading is on government debt - it is estimated that in the region of 27% of daily volume (average) relates to non-government bonds compared to 73% for government bonds[36].

In terms of listing, non-government debt far outpaces government debt (with an estimated 97% of EU bond listings relating to non-government debt[37]). However, although having the possibility to trade on exchange, estimates show that approximately 89% of non-government debt trading is actually done OTC[38].

Equity and Bond Instruments outside the scope of the MAD

A number of shares and bonds do not have exchange listings but are still traded on MTFs; at present the MAD does not apply to these instruments. In 2009 it is estimated that these instruments had a turnover on MTFs of €8.3Billion (shares) and €103.4Million (bonds), adding up to more than €8.4 Billion in just one year.

Derivative Markets

There has been significant growth over a sustained period in the international derivatives market, checked by a marked downturn in 2008. Whilst traditional exchange trading has seen some growth, the most significant growth has been in the OTC arena It is noted that exchange traded derivatives are generally more standard options and futures, whilst OTC derivatives may include more complex products such as swaps and forward rate agreements. Chart 2 below shows an indication of their respective growth.

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33 All European Equities Market Activity by Trade Type (January 2010 to January 2011), Thomson Reuters, 2011

34 All European Equities Turnover - Thomson Reuters Monthly Market Share Report, February 2011. MTFs taken from ESMA MiFID database, February 2011. Note: Includes limited proportion of European but non MiFID venues e.g. SIX Swiss Exchange. http://thomsonreuters.com/products_services/financial/financial_products/a-z/market_share_reports/

35 Source: Unpublished PWC report commissioned by DG MARKT, *Data gathering and analysis in the context of the MiFID review.*

36 Celent, October 2009 "Electronic Trading of Bonds in Europe – Weathering the storm"

37 Source: PWC report. PWC estimates based on FESE data.

38 Source: PWC report. PWC estimates based on data from UK FSA.

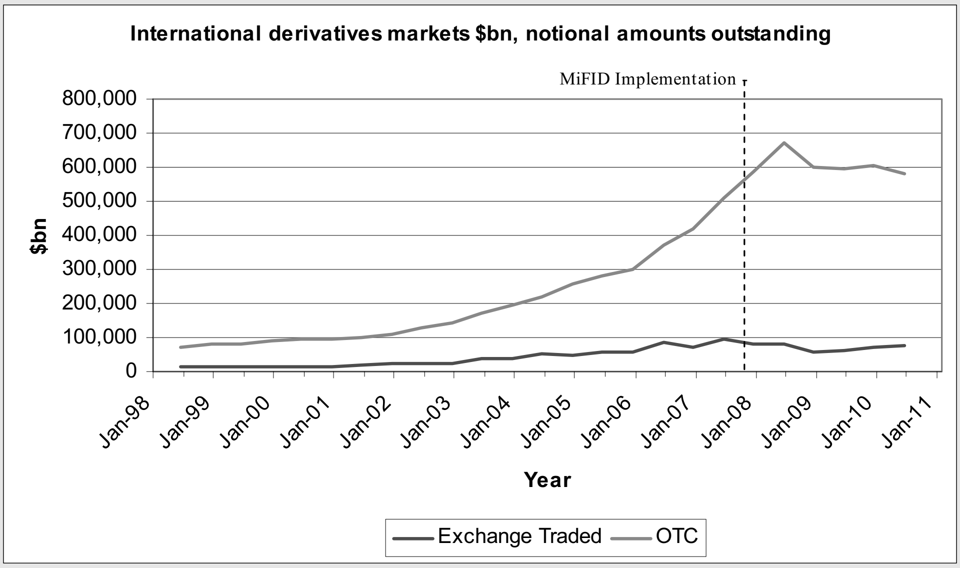


Chart 2[39] .

The following table shows a complete breakdown of global OTC derivative products (although some of these contracts may be spot contracts rather than financial instruments).[40]

Risk instruments in global OTC markets Global Notional amounts outstanding – June 2010		
	$ trillion	%
Interest rate contracts	452	77.5%
Foreign exchange contracts	53	9.1%
Equity-linked contracts	6	1.1%
Commodity contracts	3	0.5%
Credit default swaps	30	5.2%
Unallocated	38	6.6%
Total contracts	583	100.0%

3.1.3. *How widespread is market abuse?*

It is difficult to estimate the extent to which market abuse takes place within Europe. One way to estimate the prevalence of market abuse is to consider the number of cases sanctioned by competent authorities in member states, although inevitably this is likely to underestimate the true extent of abuse as some cases will go undetected due to the sophistication of the abuses or the limited resources available to investigate cases. The table below shows the number of financial sanctions imposed annually in the last two or three years for market abuse in the securities sector for the Member States for which the Commission has information. It should

39 BIS, International derivatives markets $bn, notional amounts outstanding. Statistics on exchange traded derivatives http://www.bis.org/statistics/extderiv.htm and Semiannual OTC derivatives statistics at end-June 2010, http://www.bis.org/statistics/derstats.htm

40 BIS, International derivatives markets $bn, notional amounts outstanding, "Amounts outstanding of over-the-counter (OTC) derivatives". Semiannual OTC derivatives statistics at end-June 2010, http://www.bis.org/statistics/otcder/dt1920a.pdf

be noted that this Table only sets out criminal sanctions and does not include administrative or other sanctions imposed by competent authorities.

Number of criminal sanctions imposed in some Member States[41]

Member State	Criminal sanctions imposed by the judicial authorities – number per year		
	2006	2007	2008
DE[42]	**20**	**7**	**16**
FR[43]	**31**	**19**	**16**
UK[44]	**6**	**1**	**6**
IT[45]	**Not available**	**11**	**5**
ES[46]	**Not available**	**14**	**11**
NL[47]	**1**	**2**	**4**
BE[48]	**1**	**2**	**1**
LU[49]	**0**	**0**	**0**
AU[50]	**Not available**	**Not available**	**21**
CY	**Not available**	**Not available**	**6**
PL[51]	**4**	**11**	**8**

The best current approximation for possible cases of market abuse comes from analysing market data for patterns of trading which were likely to have been manipulative, such as a significant price movement ahead of an important announcement (e.g. a takeover). The UK Financial Services Authority publishes annually its own research entitled the "Market Cleanliness Survey" which analyses the scale of share price movements in the two days ahead

41 Sources: Annual Reports 2006, 2007 and 2008, http://www.cbfa.be/fr/sanc/sanc.asp (29 July 2010).

42 criminal financial sanctions imposed by the judicial authorities, Source: Annual Report 2008, p. 158; Report 2007, p. 162. Also to be taken into account are cases in which proceedings were terminated following a payment – 17 in 2006, 14 in 2007 and 12 in 2008. additional information by DE authorities

43 Source: Annual report 2008, p. 197; Annual report 2007, p. 197; Annual Report 2006, p. 227; additional information by FR authorities

44 Does not include criminal fines imposed, source: Annual report 2008/2009, p. 33; Annual Report 07/08 P. 23Press releases

45 Source: Annual report 2008, p. 241

46 Number of sanctions imposed "mainly concerning market abuse, source: Annual Report 2008, p 210-211

47 Financial sanctions, source: Annual Report 2007, p. 38; Annual Report 2008, p. 40.

48 Does not include criminal fines imposed by the judicial authorities, source: http://www.cbfa.be/fr/sanc/sanc.asp (29 July 2010).

49 Source: Annual Report 2008, p. 145; Annual Report 2007, p. 133; Annual Report 20006, p. 137.

50 Does not include criminal fines imposed, Source: Annual Report 2008, p. 118); additional information by AU authorities

51 only criminal sanctions imposed by the courts

of regulatory announcements such as takovers (it is the only Member State to do so). The latest data available, for the year 2010, estimates the level of abnormal pre-announcement price movements (APPMs) at 21.2% of all announcements[52]. However the survey only focuses on one form of abuse (possible insider dealing) and does not relate to other forms such as manipulation through distortion of price-setting mechanisms, or data relating to false or misleading information.

The UK FSA has started pursuing criminal prosecutions for market abuse more aggressively in recent years, as part of its "credible deterrence" strategy, and the data from the last market cleanliness survey shows measurable progress in the indicator since 2009 – a reduction from 30.6% (in 2009) to 21.2% in 2010 in abnormal pre-announcement price movements[53]. While care should be taken in attributing a causal link between this improvement and the greater focus on criminal prosecutions for market abuse, the FSA considers that a 5% movement is statistically significant, and this is the lowest level of APPMs since 2003. In its 2009-10 annual report the FSA argued that "our credible deterrence agenda has become increasingly visible in the last twelve months and as a result we would expect to continue to see further progress in this area"[54]. In its 2010/11 annual report, the FSA is again cautious in attributing causality in its conclusions about the apparent progress in the market cleanliness data, saying that "while this fall has taken place against the backdrop of increasing focus on market abuse, due to the nature of the statistic, the reason behind this decline cannot be determined with certainty. We cannot say whether improved market behaviour is a contributory factor, but the change in the outcome is nevertheless to be welcomed"[55].

A further analysis of insider trading across 10 international markets attempts to quantify this in terms of profit as a percentage of total market turnover. These estimates, provided by Capital Markets CRC, estimate that profit from insider trading accounts for between 0.01 and 0.05% of total market turnover[56]. However, again it should be emphasised that this data is likely to underestimate the true extent of market abuse as it only relates to insider dealing, not market manipulation, and only relates to equity markets, not taking into account markets for other financial instruments.

As shown in annex 12, the weighted average profit gained from insider dealing in 3 exchanges[57] representing 48% of market turnover, which equates to the detriment for investors due to this form of market abuse, is estimated at 0.0356% of total market turnover in the period 2003-2009. However, this data only estimates the profit due to insider dealing and does not encompass the estimated profit due to market manipulation. In order to reach an estimate of the full cost of market abuse, including both insider dealing and market manipulation, it seems reasonable to assume that that the cost of market manipulation would be of the same order of magnitude as insider dealing, namely 0,0353% of market turnover. Based on this assumption, the cost of market abuse, including both insider dealing and market manipulation, on these 3 markets is estimated at 0.0712% of total market turnover. When applied to the market turnover on equity markets within the EU in 2010, the value of market abuse due to market manipulation and insider dealing is estimated at EUR 13.3 billion in

52 See FSA Annual report 2010/11, p. 62.
53 Ibid.
54 See FSA Annual Report 2009/10, Financial Services Authority, pp. 35-36.
55 See FSA Annual report 2010/11, p. 62.
56 Capital Markets CRC Limited, *Enumerating the cost of insider trading,* unpublished, 2010, p. 8.
57 Euronext, Deutche Börse, LSE Group

2010. This is an annual estimate of market abuse which evolves with the size of the market. It likely underestimates the true extent of market abuse as it only encompasses equity markets. A more detailed analysis of this data can be found in Annex 12.

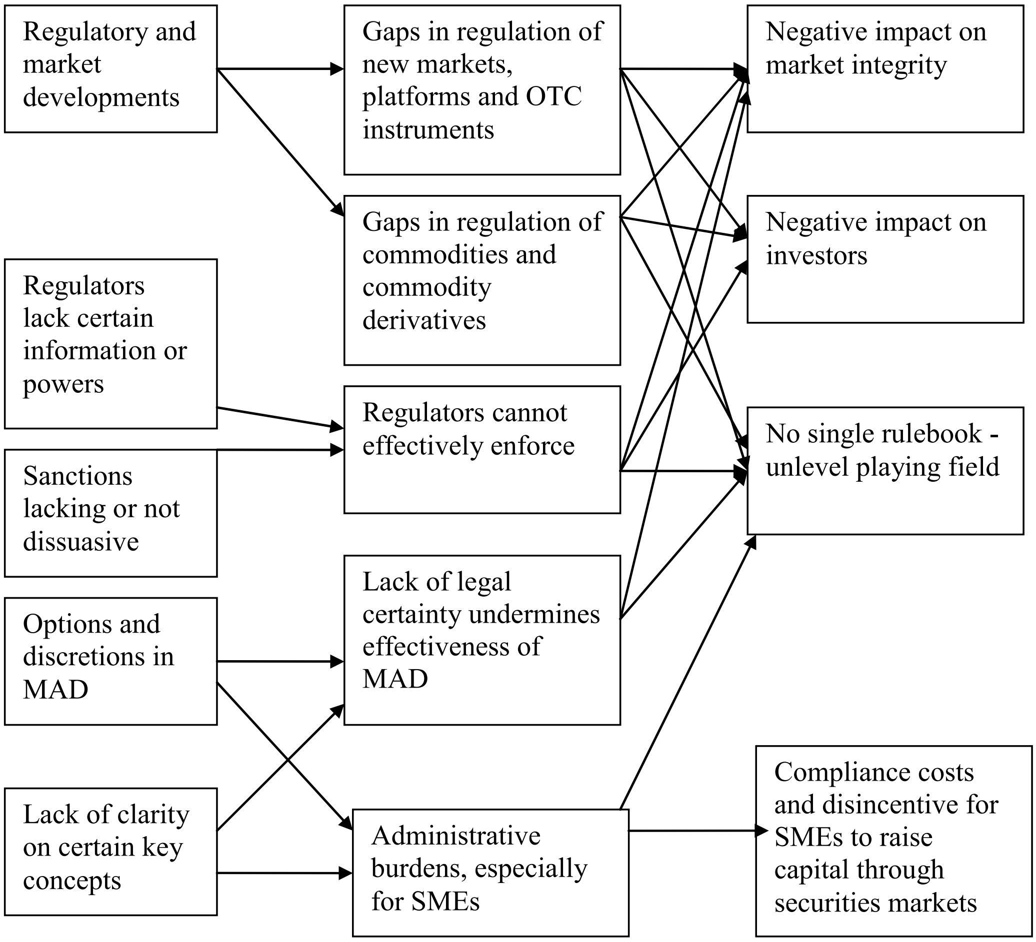
3.1.4. Stakeholders concerned by market abuse

The stakeholders concerned by market abuse are the following: investors (institutional and individual), financial intermediaries, trading venues, issuers, small and medium sized enterprises (SMEs) and regulators and all natural and legal persons that could be subject to market abuse investigations. Further consideration of how these stakeholders are affected is included in annex 6.

3.2. Problem definition

The MAD has introduced a framework to harmonise core concepts and rules on market abuse and strengthen cooperation between regulators. However, a number of problems have been identified by the Commission services and these can be broadly categorised in five groups: (i) gaps in regulation of new markets, platforms and over the counter trading in financial instruments, (ii) gaps in regulation of commodities and commodity derivatives, (iii) regulators cannot effectively enforce the MAD, (iv) lack of legal certainty undermines the effectiveness of the MAD, and (v) administrative burdens, especially for SMEs.

The figure below provides an overview of the various problems, their drivers and their consequences.



Driver Problem Consequences

The following sections provide an executive summary of the problems highlighted above; for a more detailed explanation and background in relation to these problems please see annex 7.

3.2.1. Problem 1: Gaps in regulation of new markets, platforms and OTC instruments

General scope of MAD

Section 3.1.1 has explained the scope of the MAD prohibitions on insider dealing or market manipulation of specified financial instruments; if the instruments are admitted to trading on a regulated market, the MAD applies irrespective of where the instrument is traded. When MAD was adopted, instruments traded on regulated markets were used as a proxy for instruments with the most liquid and mature markets. Instruments admitted to those markets were considered to be sufficiently standardised, the subject of enough public information and to have a broad range of investors (including retail investors), to warrant the MAD protections being applied. However, this focus on instruments traded on regulated markets has been overtaken to some extent by market developments. Increased competition and use of technology has led to greater use of MTFs and to a lesser extent broker electronic systems

(such as crossing networks and swap execution facilities) to trade instruments. Further, there are still markets which existed when MAD was adopted that remain primarily OTC markets.

Some instruments outside the scope of MAD

If an instrument is not admitted to trading on a regulated market but is only traded on a MTF, another type of facility or OTC it will not be covered by MAD. Section 3.1.2 evaluates the changes in the financial landscape since the adoption of the MAD. Of the 41 MTFs that trade shares in Europe, 25 admit to trading shares which are not admitted to trading on a regulated market[58]. Trading in these instruments falls outside the scope of the MAD, and only three Member States have extended the MAD regime in full at national level to all MTFs[59]. Eight other Member States have extended the MAD regime *in part* to all MTFs[60]. Of the remainder, two have extended the MAD fully only to some MTFs[61], 6 have extended the MAD in part to some MTFs (including 4 of the six largest)[62], and 8 Member States have not extended the MAD to any MTFs at all[63]. Overall, the majority of Member States have only extended the MAD at national level to some MTFs, or to none at all. Therefore in most Member States there are at least some MTFs which are partially or fully outside the scope of market abuse legislation.

Similarly, with an increase in the use of technology there has been an emergence of new organised trading facilities such as broker crossing networks, swap execution facilities and other inter-dealer broker systems bringing together third-party interests and orders by way of voice and/or hybrid voice/electronic execution systems. To the extent these systems trade financial instruments that are also admitted to trading on a regulated market the MAD will apply to trading on the facility. But if the facility is trading an instrument of a type that is not traded on a regulated market the MAD will not apply to that trading. The nature of these other instruments will vary. Some are extremely liquid and standardised (for example credit default swaps) while others will be illiquid and/or customised. In addition, the current review of the Markets in Financial Instruments Directive (MiFID) is considering the option of requiring more standardised and liquid OTC instruments to be traded on organised venues[64], which is expected to result in more trading of instruments such as CDS on organised venues. As a result of the development of these new organised trading venues it is necessary to consider how to adapt the provisions of the MAD to ensure that financial instruments only admitted to trading on these trading facilities are subject to the same protections to ensure market integrity and investor protection as those admitted to trading on regulated markets.

Market fragmentation

The evaluation of the MAD revealed that some stock exchanges are concerned that with the increasing trend for trading of a single instrument to be spread across a number of different markets this may make it more difficult for a single market operator to detect possible abuse.

58 Source: PWC report*,* p. 315
59 ES, HU, NL. Source: CESR Review Panel report, *MAD: Options, Discretions and Gold Plating*, November 2009, Ref CESR/09-1120.
60 AT, DK, LT, LU, PL; PT, SE, SK. Source: CESR/09-1120
61 EL, MT. Source: CESR/09-1120.
62 .BE, DE, FI, FR, IT, UK. Source: CESR/09-1120.
63 BG, CY, CZ, EE, IE, LV, RO, SI. Source: CESR/09-1120.
64 Public consultation on the review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, p.12.

This may inhibit effective enforcement. Also, they argue that surveillance requirements and standards may differ according to the nature of the venue which creates an unlevel playing field.

Use of related instruments to manipulate a market

In their evaluation of the MAD, regulators have noted that manipulation of financial instruments on a market can be achieved by the use of related financial instruments traded outside the relevant market, and have called for this to be more clearly addressed in the MAD[65]. For example the use of an OTC derivative instrument not covered by MAD to manipulate a financial instrument covered by MAD on a market. Currently the MAD does not explicitly prohibit market manipulation by the use of related instruments although in practice a number of States already prohibit such conduct. This has negative consequences for market integrity and investor protection.

Automated trading

Finally, the increased trend towards algorithmic and high frequency trading has raised issues about how regulators monitor such trading and whether MAD adequately captures specific strategies that may be abusive practices. The MAD definition of "market manipulation" is already very broad and expressly states that it should be adapted to cover new practices but the application of this wide definition to automated trading may not be sufficiently clear and precise to provide certainty to market participants.

3.2.2. Problem 2: Gaps in regulation of commodity and commodity derivatives markets

Market abuse may take place across markets. Manipulative strategies can extend across different types of markets, and a person can benefit from inside information in one market by trading on another. This raises special concerns for commodity and related derivative markets, where market integrity and transparency rules apply to the derivatives markets but not to the underlying markets. Because commodity and commodity derivatives markets are integrally linked, we shall discuss the problems that apply to these markets as a whole. Just as the price of a financial derivative depends on that of the underlying, so does the price of a commodity derivative depend on that of the underlying. When the price of a share goes up, the price of an option on that share or of an index that includes that share goes up. The same holds for commodities: when the price of oil goes up, oil indices and options to receive oil in the future go up.

Scope of this initiative

These concerns are highlighted here, and will be discussed in more detail in annex 7.1.2 below. However, while concerns may extend to both commodity and commodity derivatives markets, the options assessed below are focused on derivatives markets. It is beyond the scope of this initiative to consider the regulation of non-financial markets. This is because each underlying commodity market has a different market structure and set of price drivers. The degree to which commodities are interchangeable and portable may also vary greatly, and their production patterns are global. In contrast, financial instruments are fungible and tied to

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[65] CESR's response to the European Commission's call for evidence on the review of Directive 2003/6/EC (Market Abuse Directive), p.3.

a specific underlying instrument in a particular jurisdiction. Strong business secrecy and geopolitical issues may also affect and abruptly alter information flows and there is less systematic disclosure of market relevant information than in the case of financial instruments[66].

The interconnected and international nature of commodity and related derivative markets

While the structure of each commodity market differs, they share the common features of being global and linked to financial commodity markets and prices through the actions of market participants, who carry out trading, hedging and arbitrage operations in both markets. For instance, many commodity trading firms are based in Switzerland, where they generate one third of world trade in crude oil.[67] The global nature of commodity markets can also be clearly seen by the volume of trading in agricultural commodity futures on the Chicago Mercantile Exchange (CME), where average daily volumes in maize futures contracts exceed those in Paris (EuroNext) by a ratio of more than 100 to 1.[68] The detection of market abuse may be more difficult for commodities due to the global nature of these markets. When manipulative strategies extend across both the commodity and the commodity derivatives market, detection and prosecution would require cooperation between authorities overseeing these markets.

Currently, there is no obligation in the MAD for financial supervisors to take into account developments on physical commodity markets when monitoring financial markets for possible market abuse, or to cooperate and exchange information with regulators of physical markets in the EU or in third countries. This means that they will be looking at derivatives markets in isolation from the underlying market, which makes it hard to detect suspicious behaviour. Financial regulators have signalled the need to take a greater interest in the physical commodity markets and to cooperate more closely and share information[69]. This lack of cooperation between physical and financial market regulators could undermine the integrity of both physical and financial markets[70].

Market manipulation can occur across physical and financial commodity markets

Commodity markets are not subject to the same market integrity and transparency rules for trading activity as financial markets. General rules, such as the prohibition against fraud, apply, but there are no general provisions that ensure transparency of trading activity and prices, and that govern how traders are required to behave. Such rules may be set by a market

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66 Issues specific to each commodity market, as well as further issues arising from their interconnectedness with financial markets, are addressed in the Commission Communication on commodity and related derivative markets.

67 These commodity traders act as intermediaries, selling commodities on a forward basis, and hedging themselves in both the commodity and derivatives markets. They will therefore also be the counterparty to many derivatives trades. See http://www.gtsa.ch/geneva-global-trading-hub/key-figures

68 The December 2010 average daily volumes for maize futures contracts in Chicago equalled 183,150, while the Paris maize contract average daily volume equalled 1,264 contracts. Sources: *Monthly Agricultural Update*, CME Group, December 2010 and data supplied by NYSE-Euronext.

69 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009

70 The Commission has adopted a proposal on Energy Market Integrity and Transparency, which introduces a new energy market regulator, and a proposal on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances establishing a scheme for greenhouse gas emission allowances trading. These proposals do not cover other commodities markets.

operator, at the market level by a self-regulatory body, at national level, or they may not exist at all. As a result, the level of regulation that applies to the underlying market may be different for each commodity.

First, there are no general rules that specify what trading behaviour is permissible in commodities markets. As a result, market manipulation in commodities markets is currently not prohibited. This is a problem for derivatives markets because manipulative strategies may involve conduct that takes place on commodity futures, OTC derivatives and physical commodity markets. Regulators have noted that manipulative schemes in commodities markets may involve conduct that takes place on commodity futures, OTC derivatives and physical commodity markets.[71] A simple example is that it is possible to benefit from certain types of behaviour in the physical market by trading in the derivatives market. For instance, a trader can drive up the spot price of a commodity by hoarding it. For instance, if a trader stockpiles grain, the price of grain goes up. This also affects derivatives prices, so that a trader could benefit from stockpiling in the physical market through derivatives in the financial market. This hoarding behaviour may be perfectly legitimate in the underlying market, depending on the rules that govern that market.

The behaviour in the underlying and the derivatives market can also be more integrally linked. For instance, a manipulative strategy may involve taking a large derivatives position; stockpiling the underlying commodity, and then requiring the counterparties on the derivative deals to settle the derivatives contracts by physical delivery of the underlying. It will be difficult for the counterparties in the derivatives market to acquire the physical commodities, because they have been stockpiled. As noted, stockpiling is not necessarily illegal. In addition, forcing physical delivery is not necessarily abusive, as it may be a condition of the contract that it can be settled in this way.

Of notable concern here are cases where derivatives are used to manipulate the underlying commodities market. The potential impact of such cross-market schemes is illustrated by the recent Amaranth case for energy markets.[72] Derivatives contribute to price formation in the underlying and as such can impact its price. Distorted commodity prices will affect end users in the real economy. This type of behaviour is currently not prohibited. Derivatives trading which distorts the price of financial instruments is prohibited, but derivatives trading which distorts the prices of physical markets is not covered under the current definition of market manipulation[73].

Lack of clear rules on disclosure of information on commodity markets

Second, there are no general rules that specify what information needs to be disclosed in commodity markets. What needs to be disclosed is only determined by the rules and practices that govern individual commodity markets. These rules and practices may not be precise enough or not even legally binding, and may vary from one market to the next. This has led to

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71 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009, page 15

72 Proposal for a regulation on Energy Market Integrity and Transparency, Impact Assessment, SEC(20101510), 08/12/2010

73 Article 2 of Directive 2003/6/EC defines market manipulation as meaning, *inter alia*, transactions or orders to trade "which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level".

a lack of transparency of fundamental commodity market information in certain key commodity markets. In addition to the question of what needs to be disclosed, there is also the issue of who needs to disclose it. It will typically be market participants in the product markets who possess such information. Because they are not generally required to disclose price sensitive information in the commodities markets, such information may not be published, or only published in a fragmented way.[74]

In recent years, several studies have drawn attention to a lack of transparency of fundamental commodity market information.[75] This lack of transparency of fundamental information is also a problem for investors in commodity derivatives markets, because the value of a derivative is largely determined by the underlying instrument or commodity. For commodity derivative markets, what should be regarded as inside information is largely determined by the transparency standards prevalent in both the spot and the derivative market of the relevant commodity. These standards are often not precise enough and are different for each commodity market, which creates legal uncertainty for market participants. Because there is no legal disclosure obligation in the underlying market, there is currently also no legally binding definition of what is considered to be inside information in commodity derivatives markets. This means that investors on commodity derivatives markets are less protected from information asymmetry in the underlying market than investors in derivatives of financial markets.

The absence of transparency rules in commodity markets is not only a problem for investors, but also for supervisors. Transactions in commodities markets are not reportable, nor are OTC instruments that are referenced to commodities. This means that supervisors cannot monitor these transactions for possible abuse. Regulators have noted that the required information that would enable them to detect market abuse in energy markets is not available and express concern about the potential for such abuses to take place.[76]

3.2.3. Problem 3: Regulators cannot effectively enforce

The report by the High-Level Group on Financial Supervision in the EU recommended that "a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes". To this end, the group considers supervisory authorities must be equipped with sufficient powers to act and should be able to rely on "equal, strong and deterrent sanctions regimes against all financial crimes sanctions which should be enforced effectively". Effective enforcement requires that, in accordance with article 14 of Directive 2003/6/EC, measures are "effective, proportionate and dissuasive". This implies that sanctions should be available to competent authorities and sufficiently dissuasive. In addition, effective enforcement also relates to the resources of competent authorities, their powers and their willingness to detect and investigate abuses. However, the

[74] European Commission Consultation Paper on a Revision of the MAD, Contribution des autorités françaises

[75] Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009, page 11

The Need for Transparency in Commodity and Commodity Derivatives Markets, Piero Cinquegrana, European Capital Markets Institute (ECMI) (2008)

IMF, *Word Economic Outlook,* October 2008

[76] CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse, October 2008, page 3

High-Level Group considers that "none of these is currently in place" and Member States sanctioning regimes are regarded as often weak and heterogeneous.

Lack of data on suspicious transactions in OTC derivatives

Competent authorities lack some of the necessary powers to detect market abuse. Competent authorities lack data on suspicious transactions in OTC derivatives. However, securities regulators consider that OTC derivatives have the potential to be used for insider dealing and market manipulation[77] which remains undetected.

Lack of access to telephone and data traffic from telephone operators in some Member States

Article 12 of the MAD stipulates that competent authorities must have the right to *"require existing telephone and existing data traffic records"*. In accordance with article 12(1) of the MAD, this powers can be exercised (a) directly; or (b) in collaboration with other authorities or with the market; or (c) under its responsibility by delegation to such authorities or to the market undertakings; or (d) by application to the competent judicial authorities. In practice, two types of data constitute important evidence to detect and prove the existence of market abuse such as market manipulation and insider dealing: data records from investment firms executing transactions and telephone data records from telecom operators.

First of all, Member States can require access to telephone and data traffic records relating to trading kept by investment firms (e.g. to provide evidence of the conclusion of a contract) to ensure that competent authorities are able to investigate and detect suspected market abuse. Second, in more specific cases, for example to establish whether inside information has been transferred from a primary insider to someone trading with this inside information, access to telephone data records held by telecom operators can be very important evidence. For example, this data can be sometimes the sole evidence in a case where a board member of an company in possession of inside information may have transferred inside information by phone to a friend, relative or family member who afterwards executes a suspicious transaction based on the inside information received. The telephone traffic records from telecom operators can be used by the regulator to demonstrate that a call had been placed by the primary insider to their friend or relative shortly before that person then called their broker to instruct them to make a suspicious transaction. The traffic records from telecom operators provide evidence of a link which could be used as evidence to sanction the case.

Therefore, access to this data from telecom operators is considered among the most important issues for the accomplishment of the investigatory and enforcement tasks of CESR members.[78] Access to the data held by telecom operators by the competent authorities is covered by article 15 of Directive 2002/58/EC[79] (e-Privacy Directive) which restricts access to these records to cases where it is "*a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of*

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77 CESR's response to the European Commission's call for evidence on the review of Directive 2003/6/EC (Market Abuse Directive), p. 6

78 CESR answer to the call for evidence on the review of the MAD, of 20 April 2009, available at http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm.

79 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on processing of personal data and the protection of privacy in the electronic communications sector.

Directive 95/46/EC." Some Member States[80] have reported that this provision has made it impossible for them to obtain access to existing telephone data records from telecom operators to provide evidence for the investigation and sanctioning of market abuse when the authority does not have the possibility to pursue criminal cases. As a result, specific market abuses subject to administrative measures and/or administrative sanctions may remain undetected and unsanctioned regardless of the powers provided by article 12 of the MAD.

It should be noted that any policy measures with regard to access to telephone data records from telecom operators should be assessed on their necessity and proportionality, in compliance with article 8 of the EU charter of fundamental rights and article 16 of the TFEU.

Lack of access to private premises

Some regulators lack the power to ask permission from a court to enter private premises and seize documents[81]. This power is necessary in certain market abuse cases where a demand for access has not been complied with, or that important information would be removed, tampered with or destroyed.

Lack of protection for whistle blowers

In addition, regulators may be deprived from access to important primary information on suspicious transactions from "whistle blowers"[82] as these sources of information lack incentives and may not be sufficiently protected. As a result, market participants who may be aware of market abuse may not feel confident to report their suspicions, as they risk discrimination or loss of employment. Moreover, regulators lack the tools to address "attempts at market manipulation" which do not succeed, and where it is often difficult to prove the effect of the attempt but where there is clear evidence of an intention to manipulate the market.

Administrative sanctions lack deterrent effect

Furthermore, an evaluation of national administrative sanctioning regimes under the MAD shows that not all competent authorities have a full set of powers at their disposal to ensure they can respond to all situations with the appropriate sanction corresponding to the severity of the market abuse observed. As shown in table 1 below, 4 Member States do not have administrative measures available for insider dealing and market manipulation. Further, respectively 4 and 8 Member States do not have pecuniary administrative sanctions available for insider dealing and market manipulation.

Table 1: overview of availability of administrative sanctions[83]

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[80] CY, ES, FI, LV, NL, CESR report, p.98, Ref. CESR/09-1120, available at www.cesr-eu.org; CESR answer to the call of evidence on the review of the MAD, of 20 April 2009.

[81] In this respect, of relevance are the decision of ECHR of 21.12.2010 in cases Primagaz versus France (No 29613/08) and Sociéé Canal Plus and others v. France (no 29408/08)

[82] Alerts of suspicious transactions, which may come from a diverse range of participants often employed in financial industry itself, are sometimes referred to as "whistle blowing"

[83] Executive summary to the CESR report on administrative measures and sanctions as well as criminal sanctions available in Member States under the Market Abuse Directive (MAD), p 2, ref CESR/08-099 available at www.cesr-eu.org

Administrative sanctions	Insider dealing	Market manipulation
MS without administrative measures	4	4
MS without administrative pecuniary sanctions	8	4

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

In 8 Member States, competent authorities do not have the possibility to withdraw the authorisation in case of violations. As a result, in certain market abuse cases where it would be appropriate and proportionate to withdraw certain market players from the market, competent authorities would be unable to do so. Moreover, 18 Member States do not provide for the disqualification/dismissal of the management and/or supervisory body in cases involving market manipulation. In addition, while it is acknowledged that publication of sanctions has a deterrent effect and is of high importance to enhance transparency and maintain confidence in financial markets[84], not all competent authorities ensure that all imposed sanctions are published, which is an important factor for effective enforcement.

The level of administrative pecuniary sanctions varies widely among Member States and in some cases the maximum fine can be considered low and insufficiently dissuasive. When the gains of a market abuse offence are higher than the expected sanctions, the deterrent effect of the sanctions is undermined. This is reinforced by the fact that the offender might consider that his offence could remain undetected. As shown in table 2, respectively 4 and 9 Member States have sanctions lower or equal to EUR 200.000 while respectively 10 and 14 Member States have sanctions of more then EUR 1 Million for the same offences. These sanctions can be considered weak as insider dealing and market manipulation offences covered by Directive 2003/6/EC can lead to gains of several million euros, in excess of the maximum levels of fines provided for in some Member States.[85]

Table 2 Level of sanctions for insider dealing and Market Manipulation among Member States.

		Insider dealing	Market manipulation
Member States with maximum administrative sanctions	≤ 200. 000	4	9
	> 1 Million	10	14
Member States with administrative sanctions linked to the benefit		9	11

84 CESR, review panel report on MAD options and discretions, p 19, ref. CESR/09-1220, available at www.cesr-eu.org

85 European Commission, Impact assessment on Sanctions in the financial Services Sector, p 12; FSA Market Watch newsletter, Our strategy and key objectives for tackling market abuse, issue 26, April 2008, p.7, available at: www.fsa.gov.uk

No administrative pecuniary sanctions	8	4

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

Criminal offences are not harmonised and criminal sanctions are lacking in some Member States

An analysis of the market abuse offences which are defined as criminal offences and are therefore subject to criminal sanctions shows that there is considerable divergence among the Member States.

Table 3 – Offences of insider dealing and market manipulation subject to criminal sanctions in Member States

Article of MAD and offence	Number of EU countries with criminal sanctions	Countries without criminal sanctions
Article 2 (insider dealing by a primary insider)	26/27	BG (SI has criminal fines not imprisonment)
Article 3a (disclosure of inside information by a primary insider)	22/27	BG; CZ; EE; FI; SI
Article 3b ("tipping" by primary insiders)	25/27	BG;SI
Article 4 (insider dealing by secondary insiders)	23/27	BG; IT; SI; ES
Article 4 (disclosure of inside information by secondary insiders)	19/27	BG; CZ; ET; FI; DE; IT; SI; ES
Article 4 ("tipping" by secondary insiders)	21/27	BG; CZ; DE; IT; SI; ES
Article 5 (market manipulation)	23/27	AT; BG; SK; SI

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

The analysis in table 3 shows that none of the offences of insider dealing or market manipulation is subject to criminal sanctions in all EU Member States. For example, for the offence of improper disclosure of inside information by secondary insiders, 8 Member States lack criminal sanctions, while for the offence of "tipping" by secondary insiders, 6 Member States lack criminal sanctions. Since maket abuse can be carried out across borders, this divergence can be expected to have negative effects on the single market and could encourage potential offenders to carry out market abuse in Member States which have the least strict sanctions. It also complicates cross-border cooperation by law enforcement authorities.

Further, since criminal sanctions have a greater deterrent effect, potential offenders in Member States lacking criminal sanctions may be less likely to abstain from carrying out market abuse due to fear of criminal prosecution and possible imprisonment.

3.2.4. Problem 4: Lack of clarity and legal certainty

The MAD includes certain options and discretions as well as provisions leaving room for interpretation in practical application. An evaluation of how the MAD options and discretions are exercised by Member States shows that they have resulted in divergences and ambiguities in the rules applicable in the Member States[86]. The De Larosière report has identified options and discretions as one reason for competitive distortions and regulatory arbitrage thus as a hindrance for the efficient functioning of the single market. As a consequence the Commission, in its Communication on Driving European Recovery, has expressed the need to identify and remove key differences in national legislation stemming from options and discretions in secondary law[87]. For the MAD Review the focus in that respect is on the concept of accepted market practices (AMPs), the disclosure of inside information by issuers and the obligation on issuers' directors to report their dealings in financial instruments. Other options and discretions are addressed elsewhere in this problem definition and a full list of these is included in annex 11.

AMPs are certain behaviours when dealing in financial markets that can reasonably be expected in one national market, for example, due to local, long-established customs while potentially constituting market abuse in others. The MAD acknowledges the existence of such behaviours and allows for a defence. The regulators in each Member State can establish an AMP for the market they are responsible for. As a result the behaviours covered by that AMP will not constitute market abuse in that particular market. Inevitably the AMP concept leads to divergences in the practices allowed and the rules applicable in the different Member States, preventing a truly harmonised framework.

Issuers have to disclose inside information directly concerning them as soon as possible. This obligation is a cornerstone of the MAD, ensuring that information which is likely to affect the price of a financial instrument is made available to the public so that all investors can act on a level playing field. However, under specific conditions issuers can delay the disclosure of inside information (in short if the delay serves a legitimate interest of the issuer, does not mislead the public and the information can be kept confidential). Market participants have expressed the view that these conditions lack the necessary degree of clarity[88]. Legal uncertainty in this area can be particularly harmful if it concerns an emergency situation at a bank with potential consequences for financial stability as a whole.

Directors of issuers need to report transactions in financial instruments related to the issuer. This obligation deters directors from engaging in insider trading and provides useful information to the investing public[89]. At the moment the scope of the obligation is not

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86 The provisions of the Directive which provide for such flexibility and the resulting divergence have been mapped by CESR in their Review Panel report "MAD – Options, Discretions and Gold Plating, 2009", CESR/09-1120, January 2010.

87 Communication for the Spring European Council, Driving European Recovery, COM (2009) 114 final, 4.3.2009, p. 6.

88 See e.g. ESME report.

89 Article 6.4 of Directive 2003/6/EC and Directive 2004/72/EC.

sufficiently clear. This lack of clarity refers to applying the obligation to transactions taken on behalf of the director by a portfolio manager and to the manager pledging or lending shares.

In conclusion, the problems described above, due to the options provided to Member States in the MAD and the lack of clarity of certain provisions, give rise to possibilities for regulatory arbitrage and overall stand in the way of a level playing field and an efficient functioning of the single market.

3.3. Problem 5: Disproportionate administrative burdens on issuers, especially SMEs

According to a survey by the European Central Bank in 2009, SMEs rely mainly on bank lending, with only 0.9% of SMEs issuing debt securities and 1.3% issuing equity[90]. Some stakeholders have argued that this is in part because the initial and ongoing costs of listing outweigh the benefits for SMEs, and that EU legislation represents a barrier to access financial markets which is too high for SMEs[91].

Specialised SME markets[92] aim at providing smaller, growing companies with a platform to raise capital both through initial offerings and ongoing fund raising. Currently, these SME markets mostly fall within the MTF regime under MiFID. As explained in problem 1, such MTFs are currently not within the scope of the MAD. Although some Member States have extended some or all MAD provisions to MTFs, SME markets in some Member States[93] benefit from an adapted regime to keep costs of listing down for SME issuers. Some stakeholders argue that if all the MAD obligations are extended without adaptation to instruments only traded on MTFs, SMEs listed on, or considering a listing on, SME markets would face higher costs to access the market[94]. Stakeholders have identified as particularly problematic in this regard the obligations to disclose price sensitive information, draw up insider lists and disclose managers' transactions[95]. Estimates of the administrative burdens and one-off costs to comply with the information obligation imposed on SMEs are set out in the table below.

Overview of obligations on issuers in the MAD considered to impose one of costs to comply with the information obligation or administrative burdens on issuers, including SMEs[96]

Issuer obligation	Nature of one off costs to comply with information obligation or administrative burden imposed on issuers, including SMEs	Estimated one off cost to comply with information obligation and administrative burden for SMEs

[90] Survey on the access to finance of small and medium-sized enterprises in the euro area, European Central Bank, September 2009, p. 4.
[91] Fabrice Demarigny, *An EU-listing Small Business Act,* March 2010, p. 13
[92] There are currently 14 specialist markets for SMEs that operate across Europe, including AIM and AlterNext.
[93] For example AIM in the UK, Alternext in France, Deutsche Börse Entry Standard in Germany.
[94] See response by European Issuers to public consultation, 27 July 2010, p. 2.
[95] See response by European Issuers to call for evidence, 15 June 2009, p. 1.
[96] All data taken from EIM, *Effects of the changes in the Market Abuse Directive – Impact on Administrative Burden of Firms in the EU*, EIM, December 2010. See annex 13.

Disclosure of inside information	Requires issuers to identify inside information and disclose it immediately, with option for Member States to require notification of intention to delay disclosure to regulator	identify inside information (one-off cost to comply with information obligation): €0.5m[97] assess conditions for delay (one of cost to comply with information obligation): €1.7m[98] reporting intention to delay disclosure to regulators (administrative burden): €1.5m[99]
Insiders' lists	Requires issuers to draw up and keep updated lists of persons with access to inside information for use by regulators if needed.	€1.8m (administrative burden)[100]
Managers' transaction reports	Threshold for reporting managers' transactions is €5,000, although not applied in some Member States.	€0.3m (administrative burden)[101]

In light of these costs, some SME markets (such as AIM in the UK) therefore impose adapted disclosure requirements for SME issuers[102]. If the MAD disclosure obligations were extended unchanged to SME markets authorised as MTFs, these costs would be extended in full to small issuers listed on those MTFs, and could act as a disincentive to SMEs from seeking a listing on such SME markets.

The MAD requires issuers to draw up and update insider lists, which indicate the persons working for or on behalf of the issuer who have access to insider information[103]. Insider lists

97 EIM (2010), p. 13.
98 EIM(2010), p. 37.
99 EIM(2010); p. 38.
100 EIM(2010), p. 38.
101 EIM(2010), p. 39.
102 AIM is the London Stock Exchange's international market for smaller growing companies. Since 1995, over 3,200 companies have joined the market and currently it is home to over 1,100. AIM is not a regulated market and instead is classified as an MTF. However, it is not only a trading venue but also has a primary market function with relevant admission and ongoing requirements set out in the AIM rules. The UK Financial Services & Markets Act underpins the market framework with day-to-day regulation being the responsibility of the London Stock Exchange. Every AIM company is required to maintain a full time corporate finance adviser as a nominated adviser or Nomad. A Nomad, approved by the Exchange to act in that capacity, is responsible for assessing a company's appropriateness at admission and on an ongoing basis. When seeking to join the market, a company is required to produce an AIM admission document - based on the Prospectus requirements but adapted for smaller companies. The continuing obligations for AIM companies are based on the principles of MAD and the Transparency Directive but are less prescriptive than the requirements for Regulated Markets. For example, there is no specific requirement for companies to maintain insider lists at all times but the requirements to disclose inside information in a timely manner and to disclose all directors' deals regardless of size are fundamental to the market framework. For the latest copy of the AIM rules see http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/regulation.htm
103 Article 6.3 of Directive 2003/6/EC and 5 of Directive 2004/72/EC.

are considered useful by competent authorities in investigating suspected market abuse and have a deterrent effect. But SME stakeholders consider that the requirement to draw up and update insider lists creates significant expense and management burdens for smaller quoted companies and that the MAD regime needs to be simplified[104]. The different national requirements on the information to be included have also been criticised, as these lead to additional compliance and administrative costs for issuers listed in several countries[105].

The MAD also requires issuers to report managers' transactions, to deter insider trading by managers and provide useful information to the market[106]. An optional threshold for such disclosures of EUR 5,000 is applied by some Member States. Some stakeholders consider that an adapted regime for SMEs or a higher threshold is necessary in relation to the disclosure of managers' transactions, on the grounds that they are burdensome and time-consuming.[107]

In conclusion, the one of cost to comply with the information obligation and recurring administrative burdens described above exist due to the differences in national legislation arising from options and discretions in the MAD or the lack of clarity of certain provisions. They have as a consequence that issuers and in particular SMEs face higher compliance costs which may act as a disincentive to SMEs to raise capital through securities markets.

3.4. The Baseline Scenario

The evaluation of the options and discretions in the MAD shows that nineteen Member States have already opted to extend some or all provisions of the MAD to some or all MTFs at national level[108], and some already apply the Directive to market manipulation in OTC transactions. However, it is likely that in the absence of EU action the current wide divergence in national approaches would continue, with the result that in some jurisdictions MTFs and OTC transactions will continue not to be subject to market abuse rules at all or only in part, with the consequent risk of market abuse remaining unsanctioned in those jurisdictions. In addition, the divergence in national approaches would continue to leave scope for higher compliance costs on market participants operating across several markets.

In relation to sanctions, it could be argued that most Member States already provide for administrative sanctions in relation to the MAD, and most also provide for the possibility of criminal sanctions, and therefore that further harmonisation would provide limited benefit. However, the evaluation of the national sanctioning regimes under the MAD shows that in some parts of the Union certain market abuses would remain unsanctioned or would be sanctioned less severely than in others. This would limit the deterrent effect of sanctions and leave scope for regulatory arbitrage in the case of administrative sanctions and leave a certain scope for perpetrators who can often make use of the most lenient criminal sanction systems.

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104 The Quoted Companies Alliance, response to the consultation, 28 July 2010, p.4; EuropeanIssuers, response to the consultation, 27 July 2010, p. 2; see also the report prepared by Fabrice Demarigny in March 2010 on *"An EU-Listing Small Business Act"*, available at: http://www.eurocapitalmarkets.org/node/446.

105 See response by Herbert Smith to the call for evidence, 15 June 2009, p. 6.

106 Article 6.4 of Directive 2003/6/EC and Directive 2004/72/EC .

107 The Quoted Companies Alliance, response to the consultation, 28 July 2010, p. 4. The Association of Italian Issuers (Assonime) have argued that the low level of the threshold has resulted in markets being flooded with irrelevant information

108 ES, HU, NL, AT, DK, LT, LU, PL, PT, SE, SK, EL, MT, BE, DE, FI, FR, IT, UK. See CESR/09-1120 (November 2009), p. 6-7.

In addition, even the Member States who already apply criminal sanctions do not necessarily do this with regard to the same forms of market abuse. Therefore, EU-wide minimum rules on the forms of market abuse that are considered to be a criminal conduct would further contribute to the effectiveness of enforcement of the Union's legislative framework on market abuse.

With regard to divergences in national implementation due to options and discretions or different interpretations of key concepts, in the absence of EU action further convergence might be achieved through cooperation by national competent authorities in CESR (now replaced by ESMA). While CESR has evaluated the options and discretions it has largely not managed to achieve consensus on a more convergent approach – therefore these differences are likely to persist in the absence of EU action. Further, differences in national law arising from divergent interpretations of key concepts in the Directive are likely to persist unless these are clarified in an agreed way. The new ESMA authority could contribute to a common supervisory culture. In particular, it could have the power to conduct peer reviews of national authorities enforcement approach, and is expected to receive information about sanctions applied by national authorities. ESMA could also issue recommendations, guidelines and adopt common standards.

It should also be noted that unless the MAD is updated to reflect evolutions in the markets due to the MiFID and technological developments, the regulatory framework for market abuse will probably fall even further behind market change as derivative markets and new electronic means of trading seem likely to continue to grow.

Other legislative proposals already, or shortly to be, adopted by the Commission complement the MAD in terms of increasing market integrity and investor protection. The proposal for a Regulation on short selling and certain aspects of Credit Default Swaps[109] includes a short selling disclosure regime which would make it easier for regulators to detect possible cases of market manipulation or insider dealing linked to short selling. The proposal for a regulation on OTC derivatives, central counterparties and trade repositories[110] will also increase transparency of significant positions in OTC derivatives which will assist regulators to monitor for market abuse through the use of derivatives. The issues of transparency requirements and manipulative behaviours specific to physical energy markets, as well as transaction reporting to ensure the integrity of energy markets, are the subject of the Commission proposal for a Regulation on energy market integrity and transparency[111].

The review of the Markets in Financial Instruments Directive[112] considers options to widen the current scope of reporting in relation to transactions in instruments only traded on multilateral trading facilities (MTFs) and reporting on over the counter (OTC) transactions including derivatives. The reporting to competent authorities of OTC transactions in instruments not admitted to trading on a regulated market is not currently mandatory, and

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109 Proposal for a Regulation on Short Selling and certain aspects of Credit Default Swaps, COM (2010)482 final, 15.9.2010

110 Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, COM(2010) 484 final, 15.9.2010

111 See public consultation on the DG ENER initiative for the integrity of energy markets, http://ec.europa.eu/energy/gas_electricity/consultations/2010_07_23_energy_markets_en.htm

112 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

such reporting would make it easier for regulators to detect possible market abuse through such instruments.

Overall, if no action is taken at EU level the problems defined in this section are likely to remain without a coordinated response and to occur again in the future.

3.5. Subsidiarity and proportionality

According to the principle of subsidiarity (Article 5.3 of the TEU), action at EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU. The preceding analysis has shown that although all the problems outlined above have important implications for each individual Member State, their overall impact can only be fully perceived in a cross-border context. This is because market abuse can be carried out wherever that instrument is listed, or over the counter, so even in markets other than the primary market of the instrument concerned. Therefore there is a real risk of national responses to market abuse being circumvented or ineffective in the absence of EU level action.

Further, a consistent approach is essential in order to avoid regulatory arbitrage and since this issue is already covered by the *acquis* of the existing Market Abuse Directive addressing the problems highlighted above can best be achieved in a common effort. Against this background EU action appears appropriate in terms of the principle of subsidiarity.

The principle of proportionality requires that any intervention is targeted and does not go beyond what is necessary to achieve the objectives. At the identification of alternative options, as well as throughout the analysis and comparison of options, this principle has been guiding the process.

4. OBJECTIVES

4.1. General, specific and operational objectives

In light of the analysis of the problem above, the general objectives of the review of the Market Abuse Directive are to increase market integrity and investor protection, while ensuring a single rulebook and level playing field and increasing the attractiveness of securities markets for capital raising for SMEs.

Reaching these general objectives requires the realisation of the following more specific policy objectives:

1. Ensure regulation keeps pace with market developments

2. Ensure effective enforcement of market abuse rules

3. Enhance the effectiveness of the market abuse regime by ensuring greater clarity and legal certainty

4. Reduce administrative burdens where possible, especially for SMEs

The specific objectives listed above require the attainment of the following operational objectives:

1.

(a) Prevent market abuse on organised markets, platforms & OTC transactions

(b) Prevent market abuse on commodities and related derivatives markets

2.

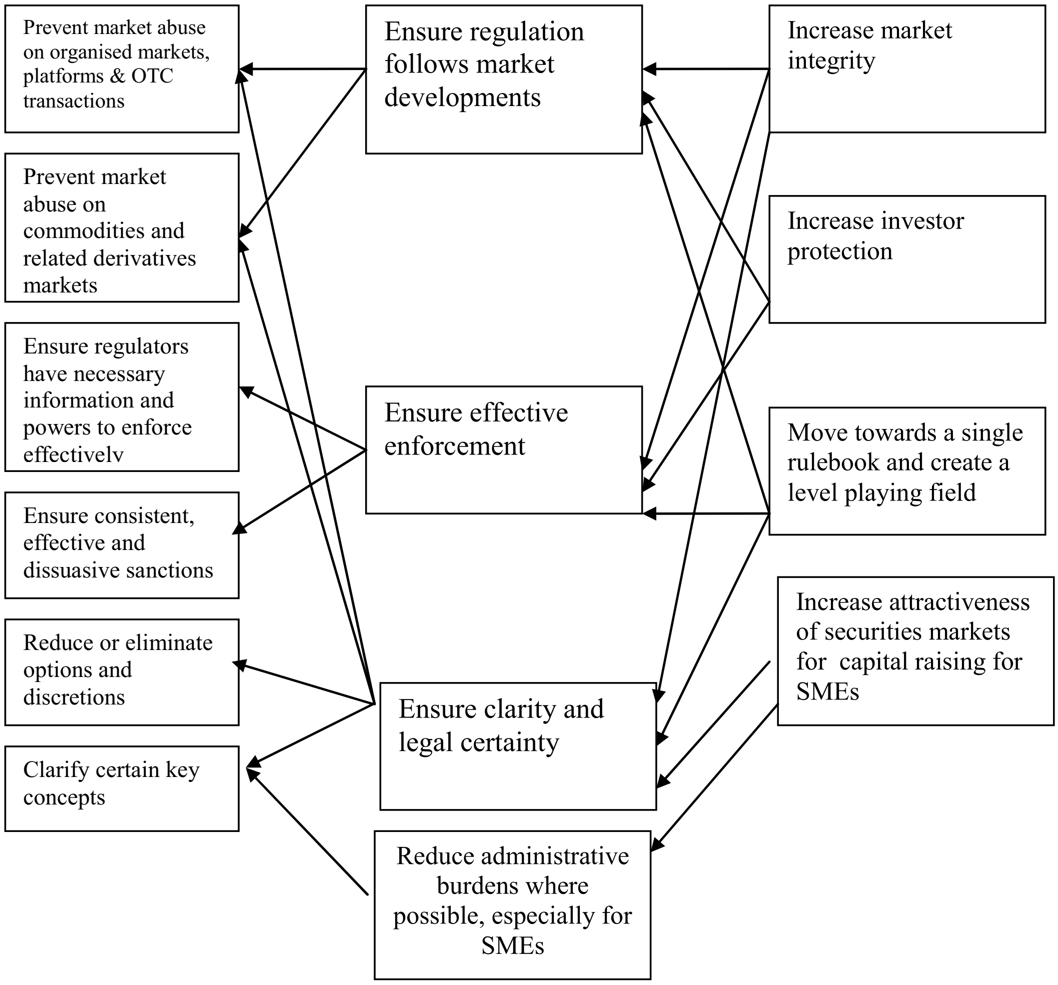
(a) Ensure regulators have necessary information and powers to enforce effectively

(b) Ensure consistent, effective and dissuasive sanctions

3. Reduce or eliminate options and discretions

4. Clarify certain key concepts

An overview of the various objectives and their interrelationships is described in the figure below.



Operational objective Specific objective General objective

4.2. Consistency of the objectives with other EU policies

The identified objectives are coherent with the EU's fundamental goals of promoting a harmonious and sustainable development of economic activities, a high degree of competitiveness, and a high level of consumer protection, which includes safety and economic interests of citizens (Article 169 TFEU).

These objectives are also consistent with the reform programme proposed by the European Commission in its Communication *Driving European Recovery*[113] , the recently adopted proposals for regulations on short selling and derivatives, as well as the recently adopted initiatives of the Commission on energy market integrity and transparency and on integrity of emission allowance markets and the ongoing MiFID review. As emission allowances are proposed to be reclassified as financial instruments as part of the MiFID review, they will also

113 Communication for the spring European Council, Driving European recovery, COM(2009)114.

fall into the scope of the market abuse framework. Specific provisions will be introduced to ensure that the market abuse rules adequately capture market integrity issues with regards to these instruments.

4.3. Consistency of the objectives with fundamental rights

The legislative measures setting out rules for market abuse and insider dealing, including sanctions should be in compliance with relevant fundamental rights and particular attention should be given to the necessity and proportionality of the legislative measures.

The following fundamental rights of the Charter of Fundamental Rights are of particular relevance:

– Respect for private and family life (Art.7)

– Protection of personal data (Art.8)

– The fundamental rights provided for in Title VI Justice: right to an effective remedy and to a fair trial (Art. 47); presumption of innocence and right of defence (Art.48), principles of legality and proportionality of criminal offences and penalties (Art. 49), right not to be tried or punished twice for the same offence (Art.50)

Limitations on these rights and freedoms are allowed under article 52 of the Charter. The objectives as defined above are consistent with the EU's obligations to respect fundamental rights. However, any limitation on the exercise of these rights and freedoms must be provided for by law and respect the essence of these rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others[114]. In the case of market abuse, the general interest objective which justifies certain limitations of fundamental rights is the objective of ensuring market integrity. The need to protect the right to property (article 17 of the Charter) also justifies certain limitations of fundamental rights, as investors are entitled to see the value of their property (e.g. shares or bonds) protected from losses caused by market abuse. A summary assessment of the impacts in terms of fundamental rights of the various policy options under consideration is set out for each option in the summary tables in section 6, and the full assessment for each option can be found in Annex 8.

5. POLICY OPTIONS

In order to meet the objectives set out in the previous section, the Commission services have identified different policy options. The table below assigns "short titles" to the options and sets out a brief explanation of the option. Where necessary, further detail on the content of each option is included in the detailed analysis of the impacts in annex 8.

Table of policy options

5.1	Policy options to prevent market abuse on organised markets, platforms & OTC transactions

[114] Article 51 of the charter of Fundamental rights of the European Union.

Option 5.1.1 no action	Take no action at EU level
Option 5.1.2 align the definition of financial instrument with the MiFID definition and clarify application of MAD to CDS	The definition of "financial instrument" would be aligned with the definition in the MiFID covering derivatives such as credit default swaps and clarify elsewhere the application of provisions to use of credit default swaps; currently it is unclear in the MAD if CDS are within the scope and given the significance of these instruments, this option would clarify this.
Option 5.1.3 extend scope to cover market manipulation by use of related instruments traded OTC, notably derivatives	The prohibition of market manipulation would be extended to the use of related instruments traded OTC (notably derivatives, including CDS) to manipulate the underlying market, where such instruments can have an impact on the underlying market.
Option 5.1.4 extend market abuse rules to instruments only admitted to trading on MTFs	Market abuse rules would be extended to apply to any financial instrument only admitted to trading on a MTF (irrespective of whether the transaction in that instrument takes place on that MTF). This corresponds to, and would consolidate, current practice in several Member States.
Option 5.1.5 extend market abuse rules to instruments only admitted to trading on other trading facilities (other then MTFs)	Market abuse rules would be extended to instruments only admitted to trading on an organised trading facility. The application would be calibrated to ensure that the rules would be applied in a proportionate manner. An organised trading facility would be defined (e.g. by reference to a definition in the revised MiFID) in a very general manner to cover any facility or system operated by an investment firm that brings together client orders or interests relating to financial instruments and that is not already classified as a regulated market, MTF or systematic internaliser.
Option 5.1.6 extend market abuse rules to instruments traded purely OTC	Market abuse rules would be extended to instruments that are traded purely OTC. Pure OTC transactions are bilateral transactions between two parties which take place off market through a contractual agreement, in financial instruments that do not have any impact on other financial instruments traded on a trading venue or facility. This option goes further than option 5.1.3, which would only extend the scope to instruments traded OTC, notably derivatives, which can have an impact on an underlying market in related instruments.
Option 5.1.7 provide examples of specific automated trading strategies that constitute market manipulation	This option would prescribe specific strategies by way of automated trading, including high frequency trading, which may be contrary to the prohibition on market manipulation in level 2 measures.
Option 5.1.8 Improve monitoring for market abuse of investment firms operating trading facilities such as MTFs	This option would extend the obligation to adopt structural provisions aimed at preventing and detecting market manipulation practices to investment firms operating an MTF and to entities operating organised trading facilities. Currently this obligation only applies to regulated markets.
Except for 5.1.1, the above policy options are not mutually exclusive and can complement each other	
5.2 Policy options to prevent market abuse on commodities and related derivatives markets	
Option 5.2.1 No action	Take no action at EU level.
Option 5.2.2 extend the definitions of inside information and market manipulation to include commodity spot contracts	This option would bring the definitions of inside information and market manipulation for commodity markets in line with the general definitions that apply to financial instruments. This alignment would be accompanied by an extension of the requirement to disclose inside information to all

	market participants.
Option 5.2.3 define inside information for commodity derivatives	This option would bring the definition of inside information for commodity derivatives in line with the general definition for financial instruments by clarifying that inside information is non-public information which would be likely to have a significant effect on the prices of such derivatives or the underlying commodities.
Option 5.2.4 obligation for spot market traders to respond to information requests from competent authorities	This option would explicitly grant competent authorities the power to request information from any person, to include direct access to spot market information, the power to require such information according to standardised formats, reporting of suspicious trading within the firm, and access to traders' systems.
Option 5.2.5 promote international cooperation among regulators of financial and physical markets	This option would require financial regulators to cooperate and exchange information with international physical commodity market regulators to ensure a consolidated overview of physical and financial commodity markets, and to detect and sanction cross-market abuses.
Option 5.2.6 require issuers of commodity derivatives to publish price sensitive information.	This option would require issuers of commodity derivatives to gather and publish on their web site all publicly available price sensitive information on the underlying commodities, as well as information with regard to trading in the commodity derivatives they have issued.
Option 5.2.7 clarify market manipulation for commodity derivatives	This option would clarify that in relation to commodity derivatives, the definition of market manipulation also extends to transactions in financial instruments that distort the price of the underlying commodity markets.
Except for 5.2.1, the above policy options are not mutually exclusive and can complement each other	
5.3 Policy options to ensure regulators have necessary information and powers to enforce effectively	
Option 5.3.1 No action	Take no action at EU level.
Option 5.3.2 introduce reporting of suspicious orders and OTC transactions	This option would introduce reporting of suspicious orders and suspicious OTC transactions.
Option 5.3.3 prohibit attempts at market manipulations	This option would extend the prohibition of market manipulation to attempts at market manipulation.
Option 5.3.4 ensure access to telephone and data traffic records for market abuse investigations	This option would clarify the power of competent authorities to obtain telephone and data traffic records from telecom operators where a reasonable suspicion exists of insider dealing or market manipulation .
Option 5.3.5 ensure access to private premises to seize documents for market abuse investigations	This option would grant competent authorities the power to enter private premises and seize documents where necessary to investigate specific cases of suspected market abuse, subject to permission from a judge.
Option 5.3.6 grant protection and incentives to whistleblowers	This option would grant protection from retaliation and set rules for incentives to whistleblowers who report market abuse to the authorities in compliance with the data protection principles[115].

115 Article 29 working party Opinion 1/2006 on the application of EU data protection rules to internal whistle blowing schemes in the fields of accounting, internal controls, auditing matters, fight against

Except for 5.3.1, the above policy options are not mutually exclusive and can complement each other	
5.4 Policy options to ensure consistent, effective and dissuasive sanctions	
Option 5.4.1 No action	Take no action at EU level
Option 5.4.2 common minimum rules for administrative measures and sanctions	This option would introduce minimum principles on type and level of administrative measures and administrative sanctions
Option 5.4.3 uniform administrative measures and sanctions	This option would introduce uniform types and level of administrative measures and administrative sanctions across the EU.
Option 5.4.4 requirement for criminal sanctions	This option would introduce a requirement for Member States to provide for effective, proportionate and dissuasive criminal sanctions for the most serious insider dealing and market manipulation offences as defined at EU level.
Option 5.4.5 common minimum rules for criminal sanctions	Common minimum rules for criminal sanctions for insider dealing and market manipulation offences as defined at EU level would be introduced under this option.
Option 5.4.6 improved enforcement of sanctions	This option would improve the enforcement of sanctions by requiring Member States to publish the imposed sanctions and encourage Member States to further cooperate where necessary through ESMA in relation to market abuse investigations
Options 5.4.2 and 5.4.3 are mutually exclusive as well as option 5.4.4 and 5.4.5 option 5.4.6 is complementary to all options.	
5.5 Policy options to reduce or eliminate options and discretions	
Option 5.5.1 No action	Take no action at EU level.
Option 5.5.2 harmonise accepted market practices	With this option the concept of AMPs would be harmonised through coordination by ESMA, who would initiate a consultation process with all national regulators before an AMP recognised as not constituting market abuse in one Member State is endorsed by all Member States.
Option 5.5.3 remove accepted market practices and phase-out existing practices	This option would remove the concept of accepted market practices from the legal framework and gradually phase-out the practices already existing.
All options are mutually exclusive	
5.6 Policy options to clarify certain key concepts	
Option 5.6.1 No action	Take no action at EU level.
Option 5.6.2 Clarify conditions of delayed disclosure of inside information	Under this option, one of the criteria for judging whether or not the disclosure of inside information can be delayed, namely that delay should not be likely to mislead the public, would either be clarified (e.g. by

bribery, banking and financial crime, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf

	specifying that it is information which goes against what the market's expectations are) or deleted altogether because it is too narrow.
Option 5.6.3 Reporting of delayed disclosure of inside information.	This option would introduce an obligation for issuers who delayed disclosure of inside information to inform their regulator of their having delayed disclosure when publishing the information, so that the regulator can verify if the conditions for delay were met..
Option 5.6.4. Determine conditions of delayed disclosure in case of systemic importance.	Under this option, in cases where inside information is of systemic importance (e.g. information that a bank is receiving emergency liquidity from a central bank) and it is in the public interest to delay its publication, the regulator would be given the power to permit a delay in disclosure of the information for a limited period
Option 5.6.5 clarify disclosure of managers transactions	This option would clarify that transactions made for managers of the issuer by portfolio managers, or transactions where managers of the issuers pledge or lend their shares, do qualify as transactions that need to be reported under the market abuse rules.
Except for 5.6.1, the above policy options are not mutually exclusive	
5.7 Policy options for reducing administrative burdens, especially on SMEs **(SME specific options in bold)**	
Option 5.7.1 No action	Take no action at EU level
Option 5.7.2 SME regime for disclosure of inside information	Under this option, SME issuers would be required to disclose inside information in a simplified market-specific way.
Option 5.7.3 SME exemption for disclosure of inside information	Under this option SME issuers would be exempted from the obligation to disclose inside information
Option 5.7.4 harmonise insiders' lists	This option would introduce harmonised requirements for drawing up insiders' lists and would entail prescribing the precise data an insider list has to contain in relation to each individual included on the insider list
Option 5.7.5 SME exemption for insiders' lists	This option would exempt SMEs from the obligation to draw up insiders' lists while requiring directors of SMEs to ensure all employees were informed of their responsibilities not to engage in market abuse.
Option 5.7.6 abolish managers' transactions reporting	Under this option the rules requiring managers of issuers to report transactions in shares of the said issuer, or in associated derivatives or other financial instruments by managers and persons closely associated with them, would be abolished.
Option 5.7.7 harmonise managers' transactions reporting requirements with an increased threshold for all issuers, including SMEs	This option would raise the threshold below which managers' transactions do not need to be reported from EUR 5,000 to EUR 20,000. This threshold would apply uniformly across the EU for all issuers, including SMEs.
Option 5.7.8 SME regime for managers' transaction reporting	This option would introduce an alternative and proportionate regime for reporting managers' transactions for issuers listed on SME Markets.
Options 5.7.2 and 5.7.3 are mutually exclusive, as are options 5.7.6, 5.7.7 and 5.7.8.	

6. ANALYSIS OF IMPACTS AND CHOICE OF PREFERRED OPTIONS AND INSTRUMENTS

This section sets out in the form of summary tables the advantages and disadvantages of the different policy options, measured against the criteria of their effectiveness in achieving the related objectives (to be specified for each basket of options), and their efficiency in terms of achieving these options for a given level of resources or at least cost. Impacts on relevant stakeholders are also considered. Impacts on fundamental rights are also considered where appropriate with reference to the Charter of Fundamental Rights (CFR).

The options are measured against the above-mentioned pre-defined criteria in the tables below. Each scenario is rated between "---" (very negative), 0 (neutral) and "+++" (very positive). The assessment highlights the policy options which are best placed to reach the related objectives outlined in section 5 and therefore the preferred one.

For a more detailed analysis of the impacts, including an assessment of the impacts on fundamental rights for each option where appropriate, please see annex 8.

6.1. Analysis of impacts of policy options

6.1.1. Policy options to ensure regulation keeps pace with market developments

6.1.1.1. Policy options to prevent market abuse on organised markets, platforms & OTC transactions

	Impact on stakeholders	Effectiveness	Efficiency
Option 5.1.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.1.2 (align the definition of financial instrument with the MiFID definition and clarify application of MAD to CDS)	*(+) regulators have increased clarity about instruments covered by the MAD and their ability to enforce is assisted* *(++) investors receive greater protection* *(+) market integrity is increased for investors*	*(++) achieves specific objective* *(++) increases investor protection and* *(++) market integrity by ensuring market abuse through CDS is clearly prohibited*	*(0)*
Option 5.1.3 (extend scope to cover market manipulation by use of related instruments)	*(++) regulators have clearer mandate to take action against manipulative behaviour using other instruments* *(++) investors in a market are better protected from use of other related instruments to manipulate the underlying market*	*(++) achieves specific objective for instruments traded OTC (such as derivatives) which impact on prices of related instruments traded on trading venues or facilities* *(++) increases investor protection as manipulation of financial instruments traded on trading venues or facilities through related instruments (such as derivatives) will be prohibited and*	*(0)*

		(++) increases market integrity by ensuring market manipulation through related OTC instruments is prohibited	
Option 5.1.4 (extend the MAD to financial instruments traded only on a MTF)	*(++) investors trading instruments only traded on a MTF receive greater protection* *(+) there is improved market integrity for instruments only traded on MTFs*	*(++) achieves specific objective for MTFs* *(++) increases investor protection on MTFs* *(++) increases market integrity of MTFs*	*(0) SME issuers listed only on MTFs could face increased costs to disclose inside information and keep insider lists in accordance with MAD but these would be mitigated by SME specific options below* *(-) some MTF operators could face some increased costs of monitoring for MAD compliance by issuers and investors*
Option 5.1.5 (extend the MAD to instruments only traded on other trading facilities (other than MTFs))	*(++) increased protection and market integrity for investors on such facilities* *(-) possible legal uncertainty for operators, investors and issuers in applying the MAD to differing instruments and facilities – could be mitigated by calibration of measures*	*(++) achieves specific objective for organised trading facilities* *(++) increases investor protection on OTFs* *(++) increases market integrity of OTFs*	*(-) issuers could face increased costs to disclose inside information and keep insider lists in accordance with MAD, but these costs could be mitigated by calibration of measures* *(-) some operators of facilities could face some increased costs of monitoring for MAD compliance by issuers and investors*
Option 5.1.6 (extend market abuse rules to instruments traded purely OTC)	*(0) negligible effect on investor protection since instruments are traded privately* *(--) un certainty for users and issuers about when and how the MAD applies to instruments*	*(+) partially achieves specific objective,* *(0) negligible effect on investor protection as there is no market to protect from abuse in the case of purely bilateral OTC transactions and* *(0) negligible effect on market integrity for the same reasons as above*	*(--) increased compliance costs for parties to private transactions to determine if and how Directive applies to them.*
Option 5.1.7 (provide examples of specific algorithmic or HFT strategies that constitute market manipulation)	*(++)greater clarity will help regulators to take enforcement action against automated trading strategies that are manipulative* *(++) greater clarity will help prevent and provide increased protection for other investors against manipulative*	*(++)achieves specific objective without compromising broad scope of existing definition of market manipulation* *(++) increases investor protection and*	*(0)*

	strategiess	*(++) market integrity by making it easier for regulators to sanction market abuse through automated trading strategies*	
Option 5.1.8 (Improve monitoring for market abuse of investment firms operating trading facilities such as MTFs and OTFs)	*(++) regulators can benefit from structural provisions implemented by venues against market abuse in carrying out their role of preserving market integrity* *(++) investors are better protected against market abuse on MTFs and OTFs* *(+) issuers would have more certainty that their instruments are traded in a properly protected environment*	*(++) achieves specific objective* *(++) also achieves objectives of increasing investor protection and* *(++) market integrity*	*(0) firms operating platforms could face increased costs, however, these will in most cases be mitigated due to arrangements already in place*

Over three quarters of respondents to the public consultation who expressed an opinion on option 5.1.3 expressed support for extending the scope in this way, including strong support from institutional and individual investor representatives[116]. There was limited opposition, although some respondents felt that the current regime already covered these products to a sufficient extent. There was strong support in the public consultation for the extension of MAD to instruments solely traded on MTFs. Respondents acknowledged the growth of MTFs and their significance in current markets. However, some respondents commented that some Member States had already modified local regimes to accommodate specialist MTFs; for example specialist SME markets. These respondents felt that current bespoke regimes for these MTFs were appropriate, that harmonisation would need to encompass these different evolutions, and that this may be a difficult task.

Most respondents to the public consultation did not address option 5.1.7 specifically in their responses, although there was specific support for it from some stakeholders.[117] Respondents to the public consultation, including investor groups, generally supported option 5.1.8, although some noted the difficulties that a trading venue may have in monitoring its market – such as market fragmentation and multiple listings, sharing of data, and understanding the reasoning of transactions.

The highest scoring policy options are options 5.1.2, 5.1.3, 5.1.4, 5.1.5, 5.1.7 and 5.1.8. These options are not mutually exclusive and in several respects reinforce each other. MTFs and OTFs can share certain characteristics, for example they are electronic, they can be operated by investment firms, they can admit to trading financial instruments not admitted to trading on a regulated market. Therefore including OTFs within the scope of market abuse rules (option 5.1.5) in addition to MTFs (option 5.1.4) would ensure that trading facilities with similar characteristics are subject to the same rules and investors on both types of platform benefit

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116 Investors representatives who supported extending the scope to MTFs in their responses were: the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association, EUMEDION (Dutch institutional investors), Investment Managers Association, European Fund and Asset Management Association (EFAMA).

117 The Association of British Insurers, Autorité des marchés financiers and Ministère de l'économie, de l'industrie et de l'emploi.

from the same protection. If adopted in isolation, either option 5.1.4 or option 5.1.5 could leave scope for those wishing to commit market abuse to migrate to the other electronic platform. So the combination of the two options ensures greater market integrity and better protection of investors than either option alone.

Similarly, if option 5.1.3 (extending scope to OTC instruments) were not combined with options 5.1.4 and 5.1.5, this would leave scope for market manipulation by OTC instruments to impact financial instruments traded on regulated markets, MTFs or OTFs. Combining the three options gives a more optimal result in terms of the objective of market integrity and investor protection. Combining option 5.1.2 with the above options would ensure that it is beyond doubt that CDS are within the scope of market abuse legislation, which is important also as these instruments are often traded on OTFs as well as OTC.

Option 5.1.7 adds to the combined effect of the above-mentioned options by further ensuring that they keep pace with market developments, as it will enable the Commission to clarify if specific new strategies employed by algorithmic or high frequency trading fall within the definition of market manipulation. Finally, combining option 5.1.8 with the above options ensures that the different types of trading venues and facilities which are within the scope of market abuse legislation are subject to similar requirements to monitor transactions to detect possible market abuse. Option 5.1.8 therefore also reinforces the options in section 6.1.3.1 seeking to strengthen the powers of competent authorities to detect and sanction market abuse.

In light of the above, the preferred option is a combination of options 5.1.2, 5.1.3, 5.1.4, 5.1.5, 5.1.7 and 5.1.8.

6.1.1.2. Policy options to prevent market abuse on commodities and related derivatives markets

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	Impact on stakeholders	**Effectiveness**	**Efficiency**
Option 5.2.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.2.2 (extend MAD to commodity spot markets)	*(+) insures market transparency and integrity rules apply to all commodity markets* *(+) gives competent authorities a consolidated view over commodity (spot and derivatives) markets* *(-) financial market rules may not be appropriate for market participants in certain markets*	*(-) financial market rules may overlap and conflict with existing sectoral legislation* *(-) commodity markets are global and EU rules will not apply to all relevant firms* *(-) difficult to apply general rules to heterogeneous markets*	*(-) will increase compliance costs for market participants not currently obliged to disclose price sensitive information* *(-) competent authorities may not have the expertise and manpower to monitor spot markets effectively*
Option 5.2.3 (define inside information for commodity	*(+) improves legal certainty for producers as to when they need to disclose and are allowed to trade*	*(+) captures all information relevant for derivatives prices* *(++) creates information*	*(+) does not affect the underlying market itself* *(-) may make*

derivatives)	*(++) clarifies which information investors can expect to receive* *(+) gives supervisors clear benchmark to assess insider dealing*	*symmetry between investors* *(+) creates incentives for disclosure of inside information* *(--) does not ensure that all inside information will be published-* *(-) those only active in the underlying market will continue to be allowed to trade on inside information*	*hedging more expensive for producers*
Option 5.2.4 (clarify the power to request information from spot market traders)	*(+) improves competent authorities' ability to monitor spot and derivative markets in a comprehensive way*	*(++) allows competent authorities easier access to spot market data*	*(+) less complicated data handling for competent authorities* *(-) imposes additional costs on non-financial market participants to submit information in a specific format, allow access to their systems, and to report suspicious transactions.*
Option 5.2.5 (promote international cooperation among regulators of financial and physical markets)	*(+) gives supervisors a consolidated overview of the market* *(+) allows supervisors to combine their market experience*	*(++) increases market integrity by reducing risk of cross-market manipulation*	*(+) no additional obligations on market participants* *(-) supervisors will incur costs for transmitting and processing data*
Option 5.2.6 (require issuers of commodity derivatives to publish price sensitive information)	*(+) provides investors with a single feed to all relevant information*	*(--) published information can be inaccurate or incomplete* *(-) time lag compared to news feeds*	*(+) lowers investor costs of gathering information* *(--) issuer costs may deter issuance of such instruments*
Option 5.2.7 (clarify market manipulation for commodity derivatives)	*(+) allows supervisors to sanction the offence of manipulating commodity markets through derivatives* *(+) allows supervisors to sanction the offence of manipulating derivatives markets through commodity markets* *(+) promotes investor confidence in derivatives*	*(++) closes the regulatory gap for forms of market abuse that affect commodityand derivatives markets* *(++) increases protection of investors and* *(++) market integrity*	*(-) financial competent authorities will need to incur costs to gain access to necessary data and extend monitoring capability*

	markets *(++) promotes stable prices for producers and users of commodity markets*		

Option 5.2.3 was raised in the public consultation and generated diverse opinions. Approximately one third of respondents to the public consultation were in favour of this option, including some institutional and individual investor representatives[118]. This included strong support from regulators. There was strong opposition from energy companies and associated bodies, who supported coordination with the proposal for a regulation on energy market integrity and transparency, while approximately one third of respondents had no strong opinion.

In the public consultation option 5.2.5 was not specifically raised. However, the majority of all respondents agreed, to differing extents, that there are key differences between commodity markets and financial markets. In particular it was noted by one respondent that for regulation to be effective there needs to be strengthened co-operation between physical market regulators and financial regulators[119].

The highest scoring policy options are options 5.2.3, 5.2.4, 5.2.5, and 5.2.7. These options are not mutually exclusive and some reinforce each other. The package of preferred options will clarify existing definitions and prohibitions. All preferred options serve to address shortcomings of the existing legal framework, and are therefore expected to yield greater benefits than the baseline scenario of doing nothing.

Commodity derivatives markets are much like other derivatives markets, but they are crucially built on commodity markets rather than on other financial markets. The differences in the underlying commodity markets lead to differences in the derivatives markets that are built on them. Currently, insider dealing and market manipulation rules draw on the rules that govern the underlying commodity markets. The preferred options ensure that the same disclosure standards apply to all commodity derivatives markets and that all cross-instrument manipulative strategies are fully in scope, and thereby offer a level playing field to investors. In terms of costs, hedging may become more expensive for producers, and supervisors will need to invest in additional data processing and monitoring tools.

Option 5.2.4, the power to request information from spot market participants, is notably important for markets where such requests cannot be done through a sectoral supervisor. 5.2.4 is thereby complementary to option 5.2.5 (strengthening international cooperation between spot and derivative market supervisors). Even in markets where a sectoral supervisor is active, the power to request the necessary information directly may be more efficient in certain cases.

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118 See responses by the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association, Investment Managers Association. Most members of the European Fund and Asset Management Association (EFAMA) supported this option, although some were opposed.

119 Ministère de l'économie, de l'industrie et de l'emploi

The extension of the prohibition against market manipulation laid down in 5.2.7 would not be effective without 5.2.4 and 5.2.5. The latter are necessary tools in order for competent authorities to be able to detect and sanction the offences defined under 5.2.7.

Option 5.2.3 requires disclosure from those active in the derivatives market. In terms of benefits, it will be clear to investors which information they may expect to receive, and how they are to conduct themselves in the derivatives markets. This package achieves this without extending financial regulation to underlying commodity markets, the costs of which would clearly outweigh the benefits.

In light of the above, the preferred option is a combination of options 5.2.3, 5.2.4, 5.2.5, and 5.2.7.

6.1.2. Policy options to ensure effective enforcement

6.1.2.1. Policy options to ensure regulators have necessary information and powers to enforce effectively

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.3.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.3.2 (introduce reporting of suspicious orders and suspicious OTC transactions)	*(++) investors: benefit from increased market integrity due to further reduction of market abuse* *(++) regulators: improved possibility to detect market abuse by availability of suspicious orders and OTC transactions*	*(++)contributes to the objective of dissuasive sanctions by improving detection of market abuse based on orders and suspicious OTC transactions*	*(+) adaptation of internal monitoring systems are proportionate and therefore reporting is an efficient tool to detect market abuse .*
	Impact on fundamental rights *Option interferes with rights in Articles 7, 8, 16 of Charter of Fundamental Rights (CFR). Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by facilitating detection of market abuse) and to protect fundamental right to property (article 17 of Charter). It is proportionate as it limits access to transaction data to competent authorities for a time-limited period for the sole purpose of market abuse investigations to ensure market integrity. Access would have to be in compliance with data protection law.*		
Option 5.3.3 (prohibit attempts at market manipulations)	*(++) investors: benefit from increased market integrity due to further reduction of market abuse* *(++) regulators: gain wider scope to sanction abuses by new offence of attempted market manipulation*	*(++) contributes to the objective of dissuasive sanctions by extending powers to sanctions attempts to market manipulation* *(++) overall contribution to the general objective of market integrity*	*(++) facilitates sanctioning of market abuse by competent authorities, who can sanction failed attempts*

	Impact on fundamental rights: *Option interferes with Articles 8 and 16 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by permitting sanctioning of attempted market manipulation where proven) and to protect fundamental right to property (article 17 of CFR). It is proportionate as it would be limited to cases where intent to manipulate can be proven even in the absence of an effect on market prices.*		
Option 5.3.4 (ensure access to telephone and data traffic records from telecom operators for market abuse investigations)	*(++) regulators are enabled to more easily establish and sanction market abuse by access to telephone and data traffic records in cases of a reasonable suspicion of insider dealing or market manipulation* *(++) investors: indirect benefit from increased market integrity* *(++) market participants: benefit from increase market integrity due to more easy detection of market abuse.*	*(++) contribution to the objective of dissuasive sanctions by increasing possibility to detect and sanction market abuse* *(++) contribution to the general objective of market integrity*	*(+) facilitates the detection of market abuse by enabling collection of evidence.*
	Impact on fundamental rights: *Option interferes with Articles 7 and 8 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection and sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as it is only being provided to competent authorities in specific cases when a reasonable suspicion exists of insider dealing or market manipulation. Further, data should be limited to what is strictly necessary for the investigation, should only used for that purpose and should be deleted when the investigation is closed without further action.*		
Option 5.3.5 ensure access to private premises to seize documents for MA investigations	*(++) regulators are enabled to more easily detect market abuse by enabling access in specific cases when suspecting market abuse* *(++) investors: indirect benefit from increased market integrity* *(++) market participants: benefit from increase market integrity due to improved detection of market abuse.*	*(+) contribution to the objective of dissuasive sanctions by increasing possibility to detect market abuse* *(+) contribution to the general objective of market integrity*	*(+) facilitates detection of market abuse by enabling collection " on-site" of evidence.*

	Impact on fundamental rights: *Option interferes with Articles 7, 8 and 16 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it is based on the safeguards of permission from a judge and access being granted to competent authorities only when a reasonable suspicion of insider dealing or market manipulation exists, and that without such access a strong risk exists that evidence would be removed, tampered with or destroyed.*		
Option 5.3.6 (grant protection and incentives to whistleblowers)	*(++) increases protection available to individuals reporting market abuse.* *(+) provides regulators with primary information and assistance in market abuse cases.* *(+) increases the accessibility of regulators.*	*(++) enhances the information available to regulators.* *(+) acts as a deterrent against potential market abuse.* *(+) ensures legal clarity for the protection of whistle blowers.*	*(+) highly efficient due to limited associated costs*
	Impact on fundamental rights: *Option interferes with Articles 7, 8 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it will ensure the protection of whistle blowers, including of their personal data, and in considering information from whistle blowers competent authorities should assess if there are reasonable grounds to suspect market abuse, based on the presumption of innocence and right of defence.*		

Generally, respondents to the public consultation supported an extension of the suspicious transaction reporting regime to include orders and OTC transactions (over three quarters of respondents who expressed an opinion supported the extension, including representatives of institutional and individual investors[120]). Regulators and member states were strongly in favour of an extension, and while most other respondents also supported the extension, a number raised potential issues as to the increased costs and its practical implementation (although no specific details of costs were presented).

120 For positive investor responses see those of the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association. However, EUMEDION (Dutch institutional investors), Investment Managers Association, European Fund and Asset Management Association (EFAMA) either had no clear opinion or were unconvinced of this option.

The public consultation highlighted that there is broad support from stakeholders for the option of prohibiting attempts at market manipulation. Overall, three quarters of those respondents who expressed an opinion on this issue were in favour of the proposed extension of the MAD regime, including investor representatives[121]. However, respondents were generally also concerned about the need to improve the clarity of the proposed definition as they felt this needs to be very clear about the elements of the offence and what must be proved. Some respondents questioned how intent would be proven on a practical level.

On option 5.3.4, responses to the public consultation from regulators and member states generally differed from those of industry participants. Several public authorities welcomed this option in their responses to the consultation or noted that they already used this power and welcomed this clarification on the grounds that the data was vital for identifying and confirming market abuse cases[122]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers.

Few respondents addressed option 5.3.5 specifically but some respondents stated that public authorities in their Member State already had such a power and supported clarifying that all should have it[123]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers. Option 5.3.6 was not included in the public consultation, but one respondent stated that a systematic approach to protected whistle-blowing could play an important role in ensuring stable and well-functioning financial markets in general[124].

Based on the analysis in the table above, options 5.3.2, 5.3.3, 5.3.4, 5.3.5 and 5.3.6 receive the highest score. These options are compatible with each other and could be combined.

Options 5.3.2 and 5.3.6 usefully complement each other in providing additional sources of information for regulators about possible market abuse; currently regulators do not receive information about suspicious unexecuted orders and suspicious OTC transactions, nor do they all receive information from whistle blowers. Combining these options will therefore make it easier than at present for regulators to detect possible market abuse with a view to sanctioning it. Options 5.3.4 and 5.3.5 will ensure that when they have reasonable grounds to suspect market abuse, competent authorities have access to telephone data records from telecom operators and can enter private premises in order to obtain evidence to sanction market abuse. Finally, by including the prohibition of attempts at market manipulation (option 5.3.3) in the package of preferred options, regulators will be able to sanction such attempts. This will reduce further the scope for manipulative behaviour to remain unsanctioned and will thereby promote market integrity and investor protection.

The powers outlined in the above-mentioned options are necessary to meet the general interest objective of ensuring greater market integrity, by making it easier for regulators to prove and

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121 See supportive responses by the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association, Investment Managers Association and a large majority of European Fund and Asset Management Association (EFAMA) members. However, EUMEDION (Dutch institutional investors) were unconvinced of this option.

122 Joint FSA/HM Treasury Response (UK), Ministry of Finance of the Czech Republic, CNMV (Spain), Ministère de l'économie, de l'industrie et de l'emploi

123 Joint FSA/HM Treasury response (UK), Central Chamber of Commerce of Finland, Athens Exchange

124 Response by UNI-Europa Finance

sanction market abuse, but are proportionate as they are subject to appropriate safeguards (notably a reasonable suspicion of insider dealing or market manipulation for options 5.3.4 and 5.3.5 and permission from a judge for option 5.3.5). A detailed analysis of their impact on fundamental rights can be found in annex 8.

There are synergies between these options and those outlined in section 6.1.1. As already mentioned, option 5.1.8 will strengthen further the capacity of regulators to detect market abuse by ensuring that operators of MTFs and OTFs adopt structural provisions to detect market abuse on their facilities, enabling them to report any suspected breaches to the regulator. Option 5.1.7 will ease enforcement by ensuring regulators have clarity on which specific strategies relating to automated or high frequency trading are in breach of the prohibition of market abuse. Option 5.2.5 will also facilitate the enforcement task of financial regulators by promoting good international cooperation with physical commodity market regulators, thereby making the detection of cross-border and cross-market abuse easier. There is also a natural complementarity with the options assessed in the ensuing section (6.1.2.2), because the market abuse powers of a regulator can only be effective if abuses are not only detected, but can also be sanctioned in an effective, consistent and dissuasive manner.

In light of this analysis, the preferred option is a combination of options 5.3.2, 5.3.3, 5.3.4, 5.3.5 and 5.3.6.

6.1.2.2. Policy options to ensure consistent, effective and dissuasive sanctions

_	*Impact on stakeholders*	*Effectiveness*	*Efficiency*
Option 5.4.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.4.2 Introduction of minimum rules on administrative measures and sanctions	*(++) all market actors will be assessed based on same standards for sanctions and similar offences will be sanctioned based on same standards* *(++) investors will be better protected against market abuse due to more effective, proportionate and deterrent sanctioning regimes across EU*	*(++) minimum rules of sanctions contribute to deterrence* *(++)level playing field: similar market abuse sanctioned based on the same common standards* *(++) minimum rules reduce regulatory arbitrage*	*(+/0) compliance costs for competent authorities for those Member States which lower level of sanctions in place*
	Impact on fundamental rights: *Option interferes with Articles 47 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it will ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence and respect the presumption of innocence and right of defence.*		

Option 5.4.3 – uniform administrative measures and sanctions	*(++) all market actors will be assessed based on same types of sanctions and market abuse will be sanctioned the same way across the EU.* *(++) investors will be better protected against market abuse due to more effective, proportionate and deterrent sanctioning regimes across EU*	*(++) minimum rules of sanctions contribute to deterrence* *(++)level playing field: similar market abuse sanctioned based on the same common standards* *(++) uniform rules reduce regulatory arbitrage*	*(-) distinct market situations and legal traditions*
	Impact on fundamental rights: *Option interferes with Articles 47 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as these uniform rules will particularly ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence across all Member States. Therefore, they contribute to "right to an effective remedy and to a fair trial" and the right of innocence and right of defence (Article 48) will be preserved.*		
Option 5.4.4 – requirement for criminal sanctions for market abuse	*(+) regulators gain a tool to sanction market abuse in those MS where this is not yet available* *(+) all market participants will be subject to criminal sanctions for market abuse improving level playing field* *(+)Investors will benefit from greater market integrity due to the additional deterrent effect of criminal sanctions*	*(++) evidence from studies and Member States shows that criminal sanctions contribute strongly to the objective* ***of increasing deterrence.*** *They have a deterrent effect due to the stigma attached to criminal conduct*[125]*; criminalisation and in particular incarceration are considered by companies to be the strongest possible deterrent*[126] *(+) criminal sanctions contribute to improved market integrity*[127] *and*	*(+) a limited number of Member States without criminal sanctions will need to introduce new rules on criminal sanctions and ensure enforcement* *(+) harmonisation of the definitions of certain offences would facilitate cross-border law enforcement cooperation*

125 Michael Levi, *Suite justice or sweet charity? Some explorations of shaming and incapacitating business fraudsters,* Vol. 4 No. 2, Sage Publications, 2001, pp. 147-162. Levi argues that criminal law is effective as it embodies a comprehensive enforcement mechanism and has a deterrent effect due to the stigma that is attached to criminal conduct.

126 Report for the Office of Fair Trading (UK)*, An assessment of discretionary penalties regimes*, London Economics, October 2009. In a survey by the OFT, companies ranked criminal penalties first in motivating compliance with the law (p. 24). The report argues that "criminalisation and other forms of personal sanctions are important added elements to the deterrent power of corporate fines and (particularly incarceration) are arguably the strongest possible deterrent for a potential infringer" (p. 9).

127 One Member State authority, the Financial Services Authority in the UK, publishes an annual "market cleanliness survey" which measures abnormal price movements ahead of key issuer announcements (such as takeovers). While many factors other than insider trading could cause such movements, such as media speculation or strategic leaks of information, and it is not possible to determine which factors are behind each abnormal price movement, this measure provides at least an indicator, albeit imprecise, o insider dealing. The UK has started pursuing criminal prosecutions for market abuse more aggressively in recent years, and the data from the last market cleanliness survey shows some progress in the

		(+) contribute to improved investor protection[128] *(+) improves level playing field by ensuring that in all Member States criminal sanctions will be available*	
	Impact on fundamental rights and compliance with article 83 TFEU: *Option interferes with Articles 47, 48, 49 and 50 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as most Member States already consider that criminal sanctions are necessary and proportionate, and the option is limited to the most serious offences.* *In accordance with article 83(2) of the Treaty (TFEU), the requirement of criminal sanctions for commonly defined serious forms of market abuses of the Member States is considered essential to ensure the effective implementation of the Union policy on ensuring the integrityof the financial market. In this context, the majority of Member States have introduced criminal sanctions in national law to address market abuse. Nevertheless, the present divergent systems undermine the level playing field in the internal market and may provide an incentive for offenders to carry out market abuse in jurisdictions which do not provide for criminal sanctions for these offences. In addition, there is no EU-wide understanding on which conduct is considered to be such a serious breach. Common minimum rules on definitions for the most serious market abuse offences would facilitate the cooperation of law enforcement authorities in the EU.Successfully prosecuting market abuse offences under criminal law often results in extensive media coverage, which helps to deterpotential defenders and has an important demonstration effect, as it shows that the competent authorities are serious about tackling market abuse. The introduction of criminal sanctions for the most serious and commonly defined market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse.*		

indicator in 2009 on one measure – a reduction from 10% (in 2008) to 4.2% in abnormal price movements for the 350 largest companies on the London Stock Exchange. While care should be taken in attributing causality, the FSA considers that a 5% movement is statistically significant. The FSA argues that "our credible deterrence agenda has become increasingly visible in the last twelve months and as a result we would expect to continue to see further progress in this area"; See *FSA Annual Report 2009/10*, Financial Services Authority, pp. 35-36.

128 Utpal Bhattacharya and Hazem Daouk, *The World Price of Insider Trading*, Journal of Finance, February 2002, p. 25, concludes that although the introduction of insider trading laws in itself is not associated with a reduction in the cost of equity "the difficult part - the enforcement of insider trading laws - is associated with a reduction in the cost of equity in a country".

Option 5.4.5 – minimum rules for criminal sanctions	*(+) regulators gain a tool to sanction market abuse in those MS where this is not yet available* *(++) all market participants will be subject to criminal sanctions based the same minimum principles for market abuse improving level playing field* *(+) Investors will benefit from greater market integrity due to the additional deterrent effect of criminal sanctions*	*(++) availability of criminal sanctions contributes to the objective of deterrence of market abuse* *(+) criminal sanctions contribute to improved market integrity and* *(+) improved investor protection.* *(+) contributes strongly to creation of a level playing field as similar market abuse can be addressed by criminal sanctions*	*(--) the majority of Member State will need to introduce new rules to ensure compliance*
	Impact on fundamental rights and compliance with article 83 (2) TFEU: *Option interferes with Articles 47, 48, 49 and 50 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as most Member States already consider that criminal sanctions are necessary and proportionate, and the option is limited to the most serious offences.* *In the spirit of Article 83 (2) certain caution is required when introducing EU criminal law for the enforcement of a policy area. Currently, not even the definition of the most serious offences are harmonised between Member States nor is there a general requirement for criminal sanctions. It would be premature to already foresee common minimum rules on types and levels of criminal sanctions without specific evidence that a basic approximation would not be sufficient. In due course, once there is enough evidence on the level of effectiveness of the policy option 5.4.4. it can be reconsidered whether any further EU level harmonisation is required in this area.*		
Option 5.4.6 –improve enforcement by providing for publication of sanctions and cooperation on investigation of market abuse	*(+) improved detection of sanctions by improved cooperation on market abuse by regulators.* *(+) improved detection of sanctions and publication ensure that issuers are treated equally* *(+)Investors will be subject to more integer market due to the additional deterrent effect of publication of sanctions*	*(++) publication of sanctions contribute to the objective of deterrence of market abuse (name and shame)* *(+) improved detection of sanctions and publication contributes to investor protection.* *(+) improved level playing field by better detection of market abuse and improved inforcement by publication of sanctions in all Member States*	*(0/-) limited additional effort generated by publication of sanctions and improved cooperation among regulators .*

Respondents to the MAD public consultation, including investor groups[129], generally supported harmonisation of sanctions at the EU level as a means to increase their deterrent effect. There was support for harmonisation of administrative sanctions at the EU level, with respondents noting that at present sanctions differed greatly between Member States and that Member States should enforce and apply MAD in a more consistent and harmonised way, with a view to reducing regulatory arbitrage. However there was also some potential uncertainty as to the practicality of complete harmonisation, especially due to the differences in markets between Member States.

In relation to the setting of minimum levels for financial penalties, there was a general consensus supporting minimum levels but some concerns about the practical implications were raised by some respondents.

There was limited specific discussion of harmonisation of criminal sanctions in the responses to the public consultation on the MAD review. Two respondents felt that penal measures should be left to member States[130], while others noted the difficulties of implementing regimes in criminal law. One respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another[131].

There was a mixed response to the option of harmonising criminal sanctions in financial services legislation in general outlined in the responses to the Communication on reinforcing sanctioning regimes in the financial services sector. On the one hand some public authorities[132] and industry or union groups[133], as well as some individual and institutional investor groups[134], were favourable to, or not against, harmonisation of criminal sanctions in the financial services sector. On the other hand, other public authorities[135], industry and institutional investor representatives[136] or others[137] were opposed to, or sceptical of,

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129 See responses by the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association, EUMEDION (Dutch institutional investors), Investment Managers Association, European Fund and Asset Management Association (EFAMA).

130 Finnish Ministry of Finance and Central Chamber of Commerce of Finland

131 German Insurance Association (GDV)

132 Central Bank of Ireland (offences to be clearly defined), Danish FSA (but subsidiarity to be addressed) Ministry of Finance Finland (compliance with fundamental rights to be ensured), Estonian Ministry of Finance (but not a priority - EU interference with criminal law in general to be avoided, offences to be clearly defined), Spanish CNMV (offences to be clearly defined).

133 Association Française des marches financiers (offences to be clearly defined in cooperation with ESAs), Nordic Financial Union, British Bankers association (but limited consistency can be achieved due to different approaches in sentencing and standards of proof).

134 Financial Services User Group, Private Client Investment Managers and Stockbrokers (but to be properly targeted and applied carefully).

135 Czech National Bank, Swedish Ministry of Finance, Austrian FSA, Ministry of Finance and National Bank of Slovakia, Ministry of Finance of Czech Republic, ESMA; German Federal Government – not proved that conditions of Article 83(2) TFEU are met.

136 ING Group (to be left to MS, could be only defined violations eligible for criminal sanction); Austrian Federal Economic Chamber (impact on constitutional law); German Insurance association, Legal and General Group; European Association of Public Banks; European federation of Insurance Intermediaries; London Stock Exchange Group (further consultation needed); Unicredit; EUMEDION (institutional investor group), UBS AG (procedural fairness and ne bis in idem to be complied with); Bundesverband Deutscher Banken – not necessary.

harmonisation of criminal sanctions. At the same time, many respondents from public authorities, industry and one investor/user group took the view that criminal sanctions for the most serious offences were appropriate[138], and several banking and institutional investor representatives specifically cited market abuse as being an appropriate sector for criminal sanctions[139]. A smaller number of respondents from public authorities, industry and one consumer organisation argued that administrative sanctions were equally or more effective[140].

Based on the analysis above, options 5.4.2, 5.4.4 and 5.4.6 receive the highest score. These three options are compatible with each other and could be combined. Options 5.4.2 and 5.4.4 reinforce each other as together they more effectively strengthen the consistency, effectiveness and dissuasive effect of administrative and criminal sanctions than either option would alone. These options would provide also for an EU-wide understanding on which conduct is considered to be a serious breach of market abuse rules. The combination of these options will ensure that sanctions for similar market abuse offences across the EU are more comparable and are stricter, which will reduce the scope for regulatory arbitrage in the case of administrative sanctions and provide room for more effective law enforcement cooperation. Option 5.4.6 will reinforce options 5.4.2 by making it the rule (with limited e (with limited exceptions) that sanctions should be published, and by strengthening cooperation between regulators in investigating market abuse.

These three options will also benefit from synergies with the preferred options relating to powers of regulators (section 6.1.2.1), as regulators will be able to sanction market abuse offences which currently may go undetected, which will further strengthen the dissuasive effect of sanctions. There are also synergies with the options to prevent market abuse on organised markets and platforms and in relation to commodity and related derivative markets. Clarifying and extending the scope of application of market abuse legislation as outlined in section 6.1 will ensure that market abuse on markets which currently may escape sanction altogether is sanctioned in a consistent, comparable and dissuasive way across the EU. As mentioned, there is a natural synergy with the options relating to powers of regulators, as the options on sanctions will ensure that where regulators detect more abuses thanks to the

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137 Linklaters (may be an obstacle to consistent application of EU law) IMF (may create problems in cooperation between authorities).

138 Central Bank of Ireland, Danish FSA (for both legal and natural persons), Romanian National Securities Commission, Association for Financial Markets in Europe (AFME – to be avoided application of both criminal and administrative); Swedish Ministry of Finance (only as a last resort + relationship with administrative sanctions and cooperation issues to be reflected); Association Française des marches financiers; FSUG (but right to claim damages to be dissociated from the result of criminal proceedings), UBS AG (useful only against individuals); Nordic Financial Union (but financial institution to be punished instead of individuals if it benefits from the violation); Centre d'étude et de perspective stratégique (against management, more efficient than fines imposed to financial institutions); Association of Private Client Investment Managers and Stockbrokers; IMF; Estonian Ministry of Finance; CNMV (but some disadvantages: longer procedures, role of supervisors limited).

139 Association of banking insurers (e.g. for market abuses); Deutsche Bank (only in some areas e.g. market abuse); AXA Investment managers (but only where some degree of fraud is involved, e.g. market abuses, misuse of client assets).

140 ING Group, Austrian FSA, CFA Institute (civil proceeding to be preferred because faster and reduce burden of proof), European Association of Public Banks, law professor, Unicredit, Federation of German consumer organisation - VzBv (potential problems of criminal sanctions linked to lack of expertise of prosecutors, long proceedings and low priority given by Courts), ESMA (disadvantages of criminal sanctions: longer, resource consuming proceedings, lack of harmonised rules on cooperation, possible increased divergence in enforcement), Italian Banking Association.

additional information and powers they receive, they will be able to ensure that these breaches are appropriately sanctioned.

Options 5.4.2, 5.4.4 and 5.4.6 are all in line with approach outlined in the Communication reinforcing sanctions in the financial sector[141]. They are in conformity with the Charter of Fundamental Rights as the limitations they impose on fundamental rights are necessary and proportionate to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property. In accordance with article 83 (2) of the Treaty (TFEU), the introduction of a requirement for criminal sanctions to address market abuse is likely to lead to increased successful prosecution of market abuse offences and to contribute to ensuring the effective functioning of the internal market, (for a more detailed evaluation of the impacts on fundamental rights and compatibility with article 83 (2), see annex 8).

In light of the above analysis, the preferred option is a combination of options 5.4.2, 5.4.4 and 5.4.6.

6.1.3. Policy options to reduce or eliminate options and discretions

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.5.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.5.2 (harmonise accepted market practices)	*(0) investment firms and investors would have the certainty of safe harbours applying EU-wide but investors' trust would be affected as practices potentially on the fringe of market abuse would be explicitly allowed in the entire EU* *(0) regulators would need to assess and consult on AMPs as they do now, but the effects of their action would have a further reach*	*(+) contribution to objective of creating a single rulebook and* *(+) enhancing clarity and legal certainty* *(-)small negative impact on investor protection and* *(-) on market integrity*	*(0) no discernible impact on resources of or compliance costs for market participants*
Option 5.5.3 (remove accepted market practices and phase-out existing practices)	*(+) investment firms and investors would benefit from greater legal certainty and a gradual move towards a single rulebook* *(0) regulators would not need to assess new AMPs anymore but periodically review the existing ones*	*(+) contribution to objective of creating a single rulebook* *(+) enhancing clarity and legal certainty* *(0) no discernible impact on investor protection and market integrity*	*(0) no discernible impact on resources of or compliance costs for market participants*

Based on the analysis above, the highest scoring option is option 5.5.3. Implementing this option would reduce a source of legal uncertainty, clarify the legal framework applicable and would be a step towards the creation of a single rulebook in the EU.

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141 COM (716) 2010 "Reinforcing sanctioning regimes in the financial services sector", available at: http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/COM_2010_0716_en.pdf

Other options assessed elsewhere will also contribute to the objective of reducing or eliminating options and discretions and reinforce the effect of this option. In particular, options 5.1.4 and 5.1.6 will ensure that all Member States have the same approach to the regulation of MTFs and suspicious transaction reports, whereas currently Member States have the discretion not to apply the MAD to MTFs. Also option 5.4.6 will remove the discretion Member States currently have not to require the publication of sanctions for market abuse. From the ensuing sections, option 5.6.3 to require issuers to inform the regulator after the event of a delay to the disclosure of inside information, option 5.7.4 to harmonise the items which regulators can request in lists of insiders and option 5.7.7 to harmonise the requirements for managers' transaction reports will also eliminate options and discretions in the current legislation. Taken together, all these options will go a long way towards the objective of creating a single rulebook and a level playing field.

In light of the above analysis, option 5.5.3 is a preferred option.

6.1.4. Policy options to clarify certain key concepts

_	*Impact on stakeholders*	*Effectiveness*	*Efficiency*
Option 5.6.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.6.2 (clarify conditions for delayed disclosure of inside information)	*(+) issuers obtain greater freedom to delay disclosure of inside information* *(- - -) investors have less transparency on actions of issuers in their investment decisions* *(-) regulators may have to investigate more cases of delayed disclosure or insider trading*	*(+) Partially meets objective of greater legal certainty (for issuers)* *(+) Partially meets objective of a level playing field (for issuers)* *(- - -) Negative impact on investor protection*	*(+) Likely to reduce costs for issuers but* *(-) Could increase costs for regulators who may have to investigate more cases of delayed disclosure or insider dealing*
Option 5.6.3 (Reporting of delayed disclosure of inside information)	*(-) issuers face costs (see section 6.8)* *(+++) regulators gain a mechanism to control delays to disclosure* *(+++) investors better protected by strictly limited delays to disclosure*	*(+++) Meets objectives of increasing investor protection and market integrity* *(+++) Eliminates an option in the current directive*	*(-) Likely to impose increased costs on issuers and regulators, but these are mitigated by 'ex post' option*
Option 5.6.4 (Determine conditions of delayed disclosure in case of systemic importance)	*(+) issuers obtain greater clarity* *(0) neutral for investors as permission of regulator needed and losses due to failure or financial instability limited* *(+) regulators gain legal certainty*	*(+++) Meets objective of greater legal certainty* *(0) Neutral impact on investor protection and market integrity*	*(0) Cost implications limited as such cases are relatively rare*
Option 5.6.5 (clarify disclosure of managers transactions)	*(+) issuers and* *(+) regulators would benefit from enhanced legal certainty* *(+) investors would benefit from additional publicly available information*	*(+) Meets objective of greater legal certainty for issuers and regulators* *(+) Meets objective of increasing investor protection*	*(-)Likely to slightly increase costs for issuers due to additional reports*

Most respondents to the public consultation did not address option 5.6.3. However, one public authority argued that the risk of no disclosure at all by an issuer was greater than the risk of that issuer illegitimately delaying disclosure[142]. Many respondents to the public consultation did not address option 5.6.4. Of those who did respond, while there was some support for regulators to have the power directly, the majority of respondents (across all categories) felt that the issuer itself rather than the competent authority should have the appropriate responsibility. Some respondents felt this could be done by the competent authority granting a waiver from the disclosure rules. One respondent felt that the trigger should not be if the institution is systematically important, but rather if the information is systematically important, and respondents also noted that at times of emergency, regulators and issuers would already be involved in close communication. Option 5.6.5 is supported by CESR[143].

Based on the analysis above, the highest scoring options are options 5.6.3, 5.6.4 and 5.6.5. These options are compatible with each other and could be combined. Indeed a combination of options 5.6.3 and 5.6.4 would ensure greater legal certainty in respect of delayed disclosure while eliminating an option in the Directive. Combining these options would therefore contribute effectively to the objective of creating a single rulebook and a level playing field. These options would also provide additional tools for enforcement by regulators, as they would be systematically informed of delayed disclosure and could therefore sanction delays which were not in compliance with market abuse rules; regulators would also have clear powers to allow a delay to disclosure of inside information in the case of systemically important information. In combination these options would therefore also contribute to achieving the specific objective of effective enforcement by regulators.

The preferred option is therefore a combination of options 5.6.3, 5.6.4 and 5.6.5.

6.1.5. Policy options for reducing administrative burdens, especially on SMEs

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.7.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.7.2 (SME regime for disclosure of inside information)	*(++) SMEs would profit from a simplified regime* *(-) regulators would need to adapt by supervising a modified, additional rule* *(+) investors may benefit from a wider choice of SMEs accessing the capital markets*	*(+) contribution to objective of reducing administrative burden* *(++) one feature in concept of making the raising of finance on capital markets more attractive to SMEs* *(-) limited impact on market transparency and* *(-) investor protection as disclosure obligation would*	*(+) SMEs would need slightly fewer resources to comply with disclosure obligation* *(-) regulators would need to commit slightly more resource to cope with an adapted rule*

142 See response by FSA/HM Treasury.

143 CESR Consultation Paper, *"Market Abuse Directive Level 3 – Fourth set of CESR guidance and information on the common operation of the Directive to the market"*, CESR/10-1168, p. 10

		be reduced in scope	
Option 5.7.3 *(SME exemption for disclosure of inside information)*	*(-) SMEs would not have to adhere to the obligation anymore but investments in SMEs would be limited due to a lack of investor confidence* *(---) regulators would face problems in supervising the insider trading prohibition* *(--) investors would rate a market as substandard where the disclosure obligation for inside information does not apply*	*(+) contribution to objective of reducing administrative burden* *(0) on balance, would not improve the attractiveness of raising finance on capital markets to SMEs* *(---)severe impact on market transparency,* *(---) integrity and* *(---) investor protection*	*(++) SMEs would need significantly fewer resources to comply with issuer-related obligations on trading venues* *(--) regulators would need to expand on resources significantly to supervise SME markets*
Option 5.7.4 (harmonise insiders' lists)	*(+) issuers would benefit from the certainty and uniformity of harmonised rules* *(0) regulators could work equally well with harmonised requirements* *(0) no discernible impact on investors*	*(+) contribution to objective of reducing administrative burden* *(0) no discernible impact on market transparency, integrity and investor protection*	*(+) issuers would need slightly fewer resources for compliance*
Option 5.7.5 (SME exemption for insiders' lists)	*(++) SMEs would not need to commit resources to drawing up insiders' lists* *(-) regulators cannot use lists as a supervisory tool for SME issuers* *(0) no discernible impact on investors*	*(+) contribution to objective of reducing administrative burden* *(+) contribution to objective of making the raising of finance on capital markets more attractive to SMEs* *(0) no discernible impact on market transparency, integrity and investor protection*	*(+) SMEs would not need to commit resources to the drawing up of insiders' lists*
Option 5.7.6 (abolish managers' transactions reporting)	*(+) issuers would feel impact of reduction in regulatory complexity and transparency as to dealings of their directors* *(-) regulators would lose benefit of deterrent effect of disclosure duty in relation to engaging in insider trading* *(--) investors would lose access to an important feature of capital market transparency*	*(++) strong contribution to objective of reducing administrative burden* *(---) severe impact on market transparency and* *(-) small impact on investor protection*	*(++) issuers could reduce resources committed to fulfilling issuer-related obligations significantly* *(--) market efficiency is reduced significantly due to important information not contributing to the valuation of instruments anymore*
Option 5.7.7 (harmonise managers' transactions reporting requirements and raise threshold)	*(+) issuers would benefit of moderate reduction of transaction reports* *(0) regulators and* *(0) investors would not be discernibly affected*	*(+) contribution to objective of reducing administrative burden* *(0) negligible impact on market transparency and no impact on market integrity and investor protection*	*(+) issuers could slightly reduce resources committed to compliance with reporting obligation*

Option 5.7.8 (SME regime for managers' transaction reporting)	*(+) SMEs would benefit of further moderate reduction of transaction reports* *(-) regulators would need to adapt to additional rule* *(-) investors would lose benefit of clearly fixed threshold applying uniformly for all issuers*	*(0) negligible contribution to objective of reducing administrative burden and* *(0) making the raising of finance on capital markets more attractive to SMEs* *(-) small impact on market transparency*	*(0) SMEs resources committed to compliance would not be discernibly reduced*

Over half of the respondents to the public consultation did not express a strong opinion on option 5.7.2, although a number of these commented that further analysis should be conducted. Approximately a quarter of respondents did not feel a specialist regime for SME issuers was necessary, whilst approximately one fifth supported an SME regime, with some investor groups supporting an SME regime and others opposed[144]. Those supporting a specialist regime felt that it was essential to give SMEs access to finance in order to encourage growth in the SME market. Further, it was felt that a proportionate regime would appropriately reflect the difference in size between SMEs, who have limited resources, and larger firms, who command more resources, whilst striking a balance of consumer protection. These respondents generally favoured the application of secondary market aspects of the MAD but considered it proportionate to modify some of the primary market requirements – such as insider lists and directors dealings obligations that apply to issuers.

Of the approximately one quarter of respondents who did not support a specifically adapted regime, most felt that MAD was a cornerstone of financial market stability and that reductions in its scope could reduce investor protection which they feel is critical to EU markets. A large majority of respondents to the public consultation who addressed the issue opposed exempting SME issuers from the obligation to disclose inside information as they felt that disclosure requirements were essential to market integrity, and that they should not be compromised.

Most responses to the public consultation did not directly address option 5.7.4. However in their response to the public consultation, the issuers association argued that issuer obligations should be simplified for all companies in the EU, not just SME issuers[145].

Based on the analysis above, the highest scoring options are options 5.7.2, 5.7.4, 5.7.5 and 5.7.7. These four options are compatible with each other and could be combined.

A combination of such options would comprehensively reduce the administrative burdens related to the issuer-related requirements of the market abuse framework, and would establish a tailored market abuse regime for SMEs with a reduced administrative burden on them (see table below). Larger enterprises would benefit particularly from the reduction in

144 There was support from the following investor groups: the Association of Private Client Investment Managers and Stockbrokers (APCIMS), Danish Shareholders Association, Finnish Shareholders Association, although APCIMS and DSA insisted that tailored rules should not mean SMEs were not subject to rule. However, EUMEDION (Dutch institutional investors), Investment Managers Association and European Fund and Asset Management Association (EFAMA) did not see the need for an adapted regime for SMEs.

145 See response by European Issuers.

administrative burden associated with the harmonised conditions for insider lists (5.7.4) and harmonised requirements for managers' transaction reports (5.7.7), and these options would also eliminate discretions in the current legislation for regulators to impose additional requirements, thereby reinforcing the options for creating a single rulebook and level playing field (see section 6.1.3).

As a result the preferred option is a combination of options 5.7.2, 5.7.4, 5.7.5 and 5.7.7.

An SME regime for issuer-specific obligations relating to market abuse, and consequent reduction in administrative burden[146]

	Obligations for all issuers	**SME regime for issuer obligations**	Estimated reduction in administrative burden for SMEs
Disclosure of inside information	Inside information must be disclosed in a detailed and comprehensive fashion.	**Inside information must be disclosed in a simplified, market-specific way**	€1.1m
Insiders' lists	Insiders' lists must be drawn up.	**SMEs are exempted.**	€1.8m
Managers' transaction reports	Threshold for reporting managers' transactions is raised to €20,000.	**The same threshold applies, however the increase to €20,000 will be of greater benefit to SMEs**[147]**.**	€0.1m

Although these reductions in administrative burden are not on a large scale, were they to be combined with similar policy actions to the benefit of SMEs in other financial services proposals the cumulative impact could contribute to increasing the attractiveness of securities markets for SMEs. These options also have the advantage of eliminating several options in the current legislation, contributing to the objective of ensuring a level playing field.

6.2. The preferred policy options and instrument

6.2.1. The preferred policy options and their overall impacts

Based on the analysis of the impacts, the preferred options to achieve the objectives set out in this impact assessment have been identified in the preceding sections. An overview of the preferred options is provided in the table below.

– **Specific objective 1: Ensure regulation follows market developments**

[146] For details of the calculation of the impact on SMEs in terms of administrative burden see section 6.8.
[147] SME managers tend to execute smaller transactions so that more of these will be below the new threshold.

<u>Prevent market abuse on organised markets, platforms and OTC transactions</u> – align the definition of "financial instrument" with the definition in the MiFID (so it clearly covers derivatives such as credit default swaps); – extend the scope of the MAD to prohibit the use of related instruments (such as derivatives) to manipulate the underlying market where such instruments can have an impact on the underlying market; – extend the MAD to financial instruments traded only on a MTF (with the option of adapting issuer obligations for SMEs - see below); – extend the MAD to financial instruments traded only on a OTF, with calibration of the measures; – provide examples in level 2 measures of specific automated trading strategies that may be contrary to the prohibition on market manipulation; – extend the obligation to adopt structural provisions aimed at preventing and detecting market manipulation practices to investment firms operating an MTF and to entities operating organised trading facilities.	**<u>Prevent market abuse on commodity and related derivative markets</u>** – Clarify definition of inside information in relation to commodity derivatives; – Require financial regulators to cooperate and exchange information with physical commodity market regulators; – Clarify that persons in possession of inside information in relation to commodities shall be prohibited from insider trading in related financial instruments; – Clarify that in relation to commodity derivatives, the definition of market manipulation also extends to transactions in financial instruments that distort the price of the underlying commodity markets, and to transactions in commodities that distort the price of the derivatives markets.
Specific objective 2: Ensure effective enforcement	
<u>Enhance information and powers for regulators to enforce effectively</u> – Introduce reporting of suspicious orders and suspicious OTC transactions. – Extend the prohibition of market manipulation to attempts at some kinds of manipulation. – Clarify the power of competent authorities to obtain telephone and data traffic records where a reasonable suspicion of insider dealing or market manipulation exists. – Grant competent authorities the power to enter private premises and seize documents where necessary to investigate specific cases of suspected market abuse, subject to permission from a judge. – Grant protection and incentives to whistleblowers who report market abuse to the authorities.	**<u>Ensure consistent, effective and dissuasive sanctions</u>** – introduce minimum principles on type and level of administrative measures and administrative sanctions – ensure a coordination role for ESMA on application and enforcement of sanctions; – introduce an obligation to require criminal sanctions for the most serious insider dealing and market manipulation offences as defined at EU level across the EU.
– Specific objective 3: Ensure clarity and legal certainty	
<u>Reduce or eliminate options and discretions</u>	**<u>Clarify certain key concepts</u>**

Remove the concept of AMPs and phase out already existing AMPs.	– Introduce an obligation for issuers who delay disclosure of inside information to inform their regulator so the regulator can where appropriatefurther verify if the conditions for delay were met – Include an express power for the regulator to permit a delay in disclosure of systemically important information for a limited period. – Clarify that disclosure of managers' transactions is required where the transactions are made for the manager by a portfolio manager and where the manager pledges or lends his or her shares – Specify more clearly the obligations on market operators to detect market abuse.

Specific objective 4: Reduce administrative burdens where possible, especially on SMEs

- Introduce strictly harmonised requirements for drawing up insiders' lists.
- Adapt and modify for SMEs the obligations to disclose inside information.
- Exempt SMEs from obligation to draw up insiders' lists.
- Harmonise provisions on the reporting of transactions by managers of listed issuers.
- Raise the threshold for managers' transaction reports

The overall impact of all the preferred policy options will lead to considerable improvements in addressing market abuse within the EU. First of all, market integrity and investor protection will be improved by clarifying which financial instruments and markets are covered, ensuring that instruments admitted to trading only on a MTF and other new types of organised trading facilities are covered. In addition the preferred options will improve protection against market abuse in commodity derivatives by improved market transparency. In addition they will ensure better detection of market abuse by offering the necessary powers to competent authorities to perform investigations and improve the deterrence of sanctioning regimes by introducing minimum principles for administrative measures of sanctions and requiring for the introduction of criminal sanctions. Furthermore, the preferred options will lead to a more coherent approach regarding market abuse by reducing options and discretions for member States and will introduce a proportionate regime for SMEs. Overall, the preferred policy options are expected to contribute to the improved integrity of financial markets which will have a positive impact on investors' confidence and this will further contribute to the financial stability of financial markets. The table below seeks to summarise the cumulative impact of the packages of preferred options.

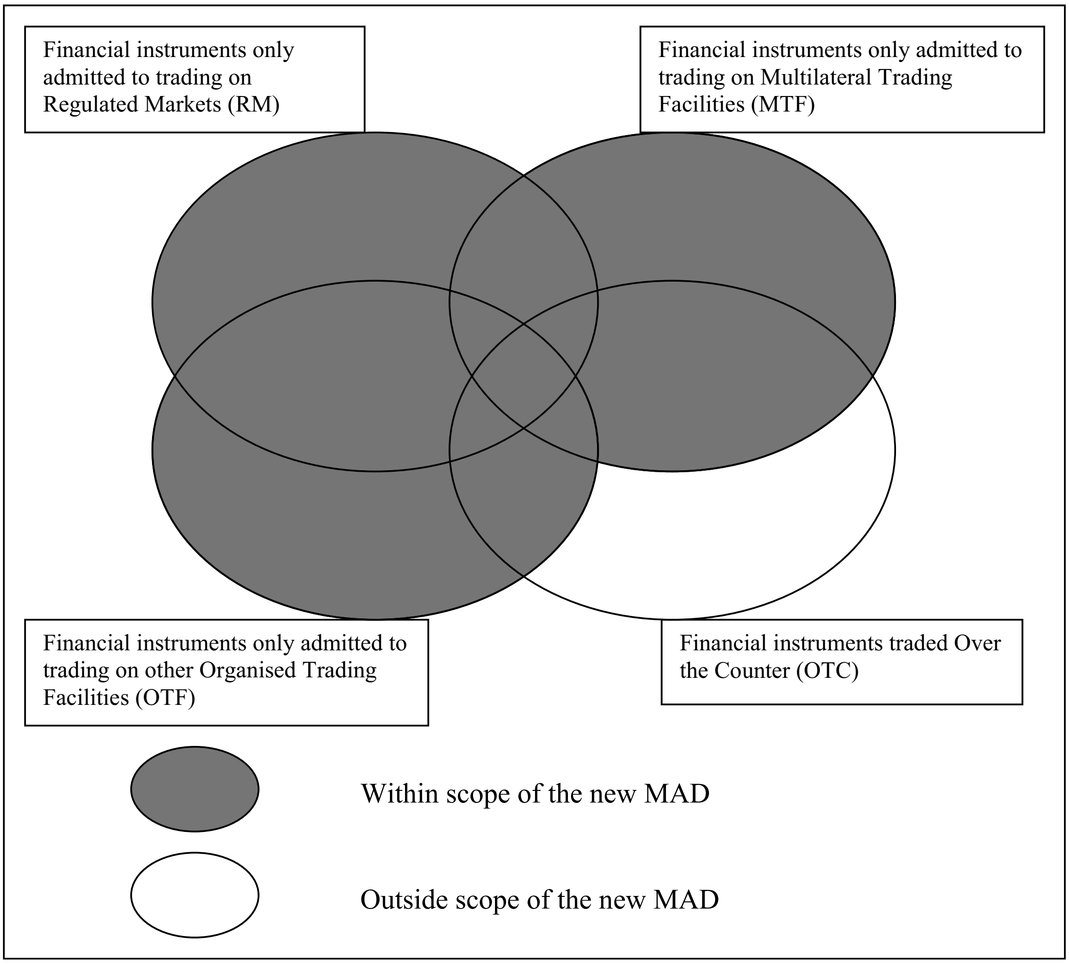
Package of preferred options	Impact on stakeholders	Effectiveness	Efficiency

Preferred options to prevent market abuse on organised markets, platforms and OTC transactions: **Options 5.1.2 + 5.1.3 + 5.1.4 + 5.1.5 + 5.1.7 + 5.1.8** (extend scope to CDS, to related OTC instruments, to MTFs, to OTFs, improve supervision of HFT, improve monitoring by MTFs and OTFs)	+++ Regulators have clear mandate to act on manipulation through OTC instruments such as derivatives (e.g. CDS) and can enforce across all trading venues and facilities +++ Investors on all trading venues and facilities protected equally against market abuse, and level of protection is higher +++ Issuers benefit from fairer trading in their financial instruments across all trading venues, additional costs for issuers on SME markets and OTFs mitigated by calibration of measures ++ Trading venues and facilities benefit from greater market integrity, but some MTF and OTF operators may face some increase in compliance costs	+++ Specific objective of ensuring regulation keeps pace with market developments fully achieved by combination of options +++ Optimal increases in level of market integrity and +++ investor protection across all trading venues, facilities and instruments	(0) Cost neutral for SME issuers due to SME specific options and for issuers on OTFs due to calibration of measures - Some MTF and OTF operators could face some increased costs of monitoring compliance
Preferred options to prevent market abuse on commodity and related derivative markets **Options 5.2.3 + 5.2.4 + 5.2.5 + 5.2.7** (define inside information for commodity derivatives, power to request info from spot traders, international cooperation among regulators, clarify market manipulation for commodity derivatives)	+++ Regulators benefit from comprehensive information and clear mandate to sanction market abuse which cuts across commodity derivative and underlying commodity markets +++ Investors benefit from greater transparency and better protection against market abuse occurring across commodity and related derivative markets and across borders ++ Producers and users of commodity markets benefit from more stable prices	+++ Specific objective of ensuring regulation keeps pace with market developments fully achieved by combination of options +++ Optimal increases in level of market integrity and +++ investor protection across all trading venues, facilities and instruments	(0) Regulators will have clearer rules and more comprehensive data but will incur some additional compliance costs (0) Producers will benefit from more stable prices but may face higher hedging costs
Preferred options to ensure information and powers for regulators to enforce effectively **Options 5.3.2 + 5.3. 3 + 5.3.4 + 5.3.5 + 5.3.6** (suspicious transaction reporting, attempts at market manipulation, access to telecoms operator data, access to private premises, whistleblowers protection)	+++ Regulators gain wider ability to detect and sanction market abuse thanks to additional powers +++ Investors benefit from increased market integrity and suffer fewer losses due to market abuse 0 Limitations on fundamental rights necessary for general interest objective of market integrity and to protect right to property, proportionality ensured by necessary safeguards	+++ Achieves specific objective of ensuring effective enforcement +++ Optimal increases in level s of market integrity and +++ investor protection	++ Benefits to regulators and investors of enhanced ability to detect and sanction market abuse outweigh additional compliance costs of suspicious transaction reporting
Preferred options to ensure consistent, effective and dissuasive sanctions	+++ Regulators gain stricter powers to sanction market abuse	+++ Achieves specific objective of ensuring effective enforcement	(0) Limited number of Member States will need to adapt existing rules on administrative

Options 5.4.2 + 5.4.4 + 5.4.6 (min. rules on admin. sanctions, require criminal sanctions, publication of sanctions and cooperation in investigations)	+++ Investors benefit from increased market integrity and suffer fewer losses due to market abuse 0 Limitations on fundamental rights necessary for general interest objective of market integrity and to protect right to property, proportionality ensured by necessary safeguards	+++ Optimal increases in level s of market integrity and +++ investor protection	sanctions or introduce new rules on criminal sanctions
Preferred options to reduce or eliminate options and discretions **Option 5.5.3** (remove accepted market practices) NB – options 5.1.4, 5.1.6, 5.4.6, 5.6.3, 5.7.4 and 5.7.7 above also contribute to this objective.	(+) investment firms and investors benefit from greater legal certainty and a gradual move towards a single rulebook (0) regulators would not need to assess new AMPs anymore but periodically review the existing ones	+++ In combination with other preferred options (5.1.4, 5.1.6, 5.4.6, 5.6.3, 5.7.4 and 5.7.7), meets general objective of creating a single rulebook and a level playing field (0) Neutral impact on market integrity and investor protection	(0) No discernible impact on resources or compliance costs of market participants
Preferred options to clarify certain key concepts **Options 5.6.3 + 5.6.4 + 5.6.5** (reporting delayed disclosure, delayed disclosure for systemic information, clarify disclosure of managers' transactions)	+ Issuers benefit from greater clarity and legal certainty even if they face some additional compliance costs +++ Regulators gain legal certainty and tool to control delayed disclosure +++ Investors better protected by strictly limited delays to disclosure and additional publicly available information	+++ Meets specific objective of ensuring clarity and legal certainty ++ Contributes to objective of creating a single rulebook +++ Meets objective of increasing market integrity and investor protection	(0) Limited compliance costs, mitigated by greater legal certainty and ex post reporting of delayed disclosure
Preferred options to reduce administrative burdens, especially on SMEs **Options 5.7.2+5.7.4 +5.7.5+ 5.7.7** (SME disclosure regime, harmonise insider lists, SME exemption for insider lists, harmonise managers' transaction reports)	+++ SMEs benefit from a regulatory framework specifically tailored to their needs (0) Neutral for regulators who can work equally well with tailored rules for SMEs (+/0) Neutral to positive for investors as no discernible impact on investor protection but they may benefit from wider SME investment opportunities	+++ Meets objective of reducing administrative burden where possible, especially for SMEs (0) Negligible impact on market integrity and investor protection	(+) SMEs and larger issuers will need to commit slightly fewer resources to compliance with these options

The diagram below explains below the envisaged scope of the MAD following the review. To contrast it with the current scope of the MAD, it should be compared to the diagram in section 3.1.1.

Diagram: envisaged scope of the MAD following the review



The new rules will extend the scope of the MAD to all instruments admitted to trading on MTFs and OTFs. They would also encompass market manipulation in OTC instruments which are related to instruments admitted to trading on RMs, MTFs or OTFs; for example, market manipulation in an equity derivative not admitted to trading on any of these venues or facilities, but which has a share as an underlying that is admitted to trading on one of the venues or facilities, would also be prohibited. Only those instruments which are exclusively traded Over the Counter (OTC) and are not admitted to trading anywhere, i.e. pure OTC transactions, would remain out of the scope of the new MAD.

6.2.2. *Choice of instrument*

6.2.2.1. Non-legislative cooperation between Member States with guidelines by ESMA

One option to achieve the objectives set out in this report would be through cooperation between regulators in the EU Member States, coordinated through ESMA. It is worth noting that under the current framework there is already extensive coordination and cooperation among regulators via CESR, for example due to common work on the convergent implementation of the market abuse provisions or due to coordination in cross-border investigations. This experience could be utilised and extended further in order to make progress in achieving certain objectives outlined in this impact assessment by finding and agreeing on common and harmonised approaches. For example, the precise reach of the duty to report managers' transactions could be clarified by regulators. Also a list of practices in the area of automated trading potentially constituting market manipulation could be agreed on by regulators and subsequently enforced accordingly. However, differences in the application of the Market Abuse Directive still existing today illustrate the practical limits of voluntary cooperation.

The substantial disadvantage of this approach is that it would be based on voluntary cooperation of regulators against the backdrop of an existing legal framework. Voluntary cooperation can only go so far as is allowed by the letter of the law. It cannot replace targeted amendments, additions or extensions of the legal provisions as envisaged by a large number of proposals in this impact assessment designed to strengthen market integrity and investor protection. For example, extending the scope of MAD to prohibit the use of related instruments to manipulate the underlying market or to prohibit attempts at certain kinds of market manipulation would as a consequence establish offences punishable by administrative or criminal sanctions. Such extensions need a proper legal basis and using non-legislative cooperation as an alternative instrument is not the appropriate option. As another example SMEs could not be exempted from the obligation to draw up insiders' lists based on non-legislative cooperation between Member States. In the current directive text this obligation applies to all issuers alike and needs to be applied as such by the national supervisors. A differentiation exempting certain small issuers which are not even defined in the directive text would lack the necessary legal basis. Therefore, based on the limitations associated with using non-legislative cooperation, this instrument is discarded as a viable solution.

6.2.2.2. A Directive amending the Market Abuse Directive

Having rejected the option of proceeding by non-legislative cooperation, this leaves the option of trying to achieve the objectives described in this impact assessment by a legal instrument. A harmonising legal instrument would have the effect of ensuring the application of the targeted amendments, additions and extensions of the market abuse framework in all Member States. The improvements for market integrity and investor protection would be attained in the entire EU, possibilities for regulatory arbitrage would be minimised and compliance costs for market participants operating on a pan-EU basis would be reduced. A decision must be taken whether the suitable legal instrument should be a Directive or a Regulation.

Traditionally, the Directive has been the predominant legislative instrument in the area of financial services. Directives were the most appropriate tool for gradually aligning national rules affecting financial markets and their participants. The Directive as a legal instrument enables the EU to impose binding results on Member States but to give them the choice of form and method to achieve those results, for example by integrating new rules into national legal texts. Also Directives often give Member States the option of imposing stricter rules

than is foreseen in the EU legal act. A Directive would leave Member States with a certain degree of discretion for maintaining divergent rules, as occurred with the practical implementation and application of the current Market Abuse Directive. However, as already today, this would be limited to matters which are not fully harmonised in the Market Abuse Directive together with the Commission measures.

6.2.2.3. Transforming the Market Abuse Directive into a Regulation

The high level group on Financial Supervision[148] highlighted that the current regulatory framework within financial services lacks cohesion which is based on the options and discretions offered to Member States in the transposition of Common Directives and its implementation at national level. The problem section[149] has demonstrated this is also valid for the current Market Abuse Directive. The current set-up consists of one framework directive and four implementing measures, three of them being directives. The directives were transposed into national law via a significant number of national acts and ordinances making the exact law applicable hard to find and comprehend for undertakings and ordinary citizens alike. To address the issue, the high level group recommends that an effective single market for financial services should have a harmonised set of core rules, and the European Council endorsed this by requesting the creation of a Single Rulebook for financial services.[150] .

A Regulation would avoid that transposition leads to diverging national rules, interpreted according to diverging cultures, and would ensure best a harmonised set of core rules applicable in the EU and contribute to the functioning of the single market. This is of particular importance for the revision of the market abuse framework as a number of preferred options intend to reduce or eliminate existing options and discretions and to clarify certain key concepts which can best be achieved by the means of a directly applicable, precise regulation text. The application of a key concept like the delayed disclosure of inside information can have significant effects on financial stability. Therefore, taking implementation as one potential source of divergences out of the process would contribute to legal certainty and uniform application in a sensitive area. At the same time, if in some limited areas flexibility is needed for Member States to lay down stricter requirements or implementing provisions, this can be accommodated by an appropriate wording of the Regulation. For example, the Regulation can explicitly allow Member States to impose additional requirements, or it can require and empower Member States to lay down implementing provisions in certain limited areas.

While a Directive requires national implementing provisions to be adopted, leaving scope for interpretation, the direct applicability of a Regulation will offer greater legal certainty for those subject to the legislation across the EU. Especially those issuers and investors operating on a pan-European basis would benefit from the added legal certainty a comprehensive and uniform legal framework can deliver. In addition, a regulation could make the market abuse law applicable in the EU more accessible to EU citizens, entities operating on a cross-border basis and third country investors and regulators.

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148 Recommendation 10, Report by the High level group on financial supervision chaired by Jacques Delarosière, available at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf

149 Particularly section 3.2.3 on enforcement and section 3.2.4 legal certainty and clarity

150 Conclusions of 18/19 June 2009.

Using the instrument of a regulation would reduce regulatory complexity and may reduce compliance costs, for example by diminishing the need for buying-in expensive legal advice for investors and issuers operating on a cross-border basis. Especially for issuers operating on a cross-border basis a uniform set of rules does have the potential for significant cost savings as they can rely on identical rules applying throughout the Union. The same goes for issuers who may seek a listing on a multilateral platform for the first time and who then can rely on identical obligations applying regardless of which venue they choose and where it is situated.

A single Regulation directly applicable across the EU will also reassure investors that market integrity standards follow the same rules in all EU markets, and will contribute to encourage them to seek for investment opportunities in foreign markets. It will also contribute to avoid any risk of regulatory arbitrage: the potential for violators to structure their trades in a way to avoid Member States with strong rules against market abuse rules will be reduced.

Furthermore, a regulation may from the perspective of third countries transmit the picture of a single market with a single rulebook being in place that could be used as a source of reference when trying to export regulatory standards.

Technically, an impact of transforming the MAD into a regulation is that the legal text will need to be redrafted in order to provide for direct applicability of the rules. In addition, the three Level 2 implementing measures currently in the form of a directive will also need to be transformed into a regulation.

Finally, it should be borne in mind that a Regulation is usually immediately applicable after adoption by the legislator and therefore the response to deficiencies in financial markets would be swifter. Any future modifications of the Regulation could be implemented more quickly as they would not require transposition by national legislators. However, at the stage of a switch from a Directive to a Regulation Member States could be given a certain minimum period to adapt their national rules in order to facilitate a smooth transition.

In conclusion, the Commission services consider a Regulation rather than a Directive to be the most appropriate instrument for defining the future market abuse framework.

6.3. Impact on retail investors and SMEs

To the extent that retail investors invest in financial instruments they tend to do so to save for the long term and primarily through life insurance and funded pension schemes; however, retail investors also save through term deposits and investment funds[151]. In some countries more than others, bonds are also very popular with retail investors[152]. Investments in listed

[151] "A review of the EU market in 1999-2005 points to the dominant role of life insurance and funded pension schemes which jointly account for nearly one half of the total long-term retail savings at the EU level. They are followed by term (and comparable) deposits (21%) and investment funds (c. 15%). However, the aggregate figures conceal pronounced and persistent differences among member states. Pension funds and life insurance dominate decisively in the Netherlands and the UK whereas many southern Europeans, for example, still save mainly through interest-bearing instruments such as deposits and bonds." See *The European Market for Consumer Long Term Retail Savings Vehicles*, Final Report, BME Consulting, 15 November 2007, p. 11.

[152] "German households have 13% of their long term savings in fixed income products. The proportion in Italy is a remarkable 32%, a figure that, moreover, has increased from 26% in 1999. In other countries, only Spain (5%), Austria (10%), Portugal (11%), Belgium (14%) and Greece (14%) have retail bond holdings in excess of 5% of total household long term financial assets." Ibid, p. 42.

shares by retail investors have experienced a pronounced decline between 1999 and 2005[153]. This continuous decline in the participation of individual investors in listed share markets is confirmed by another study which shows that only 14% of the market value of listed shares is held by individual investors and households[154]. The participation of retail investors in listed share markets through collective investment institutions (investment and pension funds, unit trusts) has also declined, from 24% to 22%, between 1999 and 2007[155]. In contrast, derivatives remain of marginal importance for the retail market[156].

In light of the above, the options which are likely to have the greatest impact on retail investors are those which have an impact on the financial instruments and markets popular with retail investors and their institutional investors, which tend to be shares and bonds traded on regulated markets or MTFs. Therefore the options to extend the market abuse rules to instruments traded on MTFs and improve supervision of MTFs could be expected to benefit retail investors by increasing their confidence in the integrity of these markets. The options relating to instruments only traded on organised trading facilities and to commodity derivatives are therefore not likely to have any significant effect on retail investors, as such financial instruments and systems are unlikely to be used by retail investors.

However, retail investors could be expected to benefit from the proposals to reinforce the powers of regulators to detect and sanction market abuse, which are expected to increase the integrity of markets and the protection and confidence of investors. For example the option to prohibit attempted market manipulation, which would make it easier for regulators to sanction market manipulation and thereby increase the integrity of markets with significant retail investor participation and the confidence of retail investors in those markets. Similarly the option to introduce reporting of suspicious orders and suspicious OTC transactions is expected to facilitate the detection and sanctioning of market abuse, increasing market integrity and the protection of retail investors on those markets. The options which would make sanctions more deterrent and consistent across Europe could also be expected to increase investor confidence as more abuses are sanctioned in a visible way and more severely.

The application of MAD rules to instruments only traded on MTFs (such as SME markets) is expected to have a positive effect on market integrity in SME markets and may encourage greater investment in SME shares due to increased investor confidence that there will be a reduced possibility of market abuse on these markets and an increase in the detection and sanctioning of market abuse where it does occur.

Several preferred options are expected to have an impact on SME issuers. The option to require issuers, including SME issuers, to notify competent authorities ex post of delays to disclosure of inside information is expected to impose an additional administrative burden on SME issuers of 1.8 million euro recurring (see section 6.8). However, other preferred options that will have a positive impact on SMEs in terms of administrative burden are the tailoring of the MAD issuer obligations for SME issuers on SME markets by the establishment of an

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153 "Quoted stocks went from accounting for 12.6% of the long term investment of European households at year-end 1999 to 8.8% at the end of 2005." Ibid, p.45.

154 Federation of European Stock Exchanges (FESE), *Share Ownership Structure in Europe*, December 2008, p.7.

155 Ibid, p. 11.

156 BME Consulting (2007), p.77.

SME regime for disclosure of inside information and the exemption of SMEs from drawing up insider lists. These options are expected to reduce administrative burdens by 1.1 million euro and 1.8 million euro respectively. SME issuers would also benefit from changes to the regime for managers transaction reporting, which would result in an estimated reduction of the administrative burden on SME issuers of 0.1 million euro. The cumulative impact of the preferred options on SME issuers is expected to lead to an overall reduction of administrative burden on SME issuers of an estimated 1.2 million euro. For further details see the table below and section 6.8.

Impact on SMEs of proposed options in terms of administrative burden

		Total admin burden (million EUR)
SME regime for SME issuers' disclosure requirements, consisting of:		
	SME regime for disclosure of inside information	-1.1 (reduction)
	Exemption SMEs from requirement to keep insider lists	-1.8 (reduction)
	Harmonising the conditions for reporting of managers Transactions, including an increased threshold for all issuers including SMEs.	-0.1 (reduction)
Total admin burden for SME regime for SME issuers' disclosure obligation		**-3 (reduction)**
Requirement on issuers to notify competent authorities ex post of delayed disclosure		**1.8**
Total Administrative burden for SMEs		**-1.2 (reduction)**

6.4. Impact on third countries

This initiative is expected to have an impact on third countries in a number of respects. First of all, the proportion of non-EU resident investors in shares in the listed shares of European markets has been rising between 1999 and 2007, reaching a weighted average of 37% in 2007[157]. It could be expected that the options envisaged in this initiative to increase market integrity and investor protection will make investing in EU shares even more attractive to investors in third countries, which could be expected to increase this trend further.

The initiative is expected to have an impact on third countries, notably the United States, in another respect. An overview of the US regime on market abuse is included in annex 9. Since

[157] FESE (2008), p. 6.

the preferred options will introduce greater symmetry with the US legislative framework for market abuse, this will facilitate the access of EU trading venues to investors in the US market. In particular, the US market abuse regime applies to alternative trading systems, the US equivalent of European MTFs. So extending the European market abuse regime to MTFs would increase regulatory convergence with the US and could be expected to make it easier for MTFs in EU Member States to be able to access investors in the US market. Similarly, extending the scope of the MAD to other organised trading facilities will make it easier for these trading facilities to access the US market as they could be deemed equivalent to the US "swap execution facilities", which the US has plans to include in its market abuse regime. Another area where the EU approach would converge with that of the US is the granting of protection and incentives for whistle blowing.

There is also likely to be an impact on third countries in relation to proposals relating to commodity derivative markets. This is because commodity derivative markets are integrally linked with the underlying commodity markets which are increasingly global, and although the proposals in this initiative focus on the commodity derivative markets located in the EU, for many commodities, the underlying market may be located outside the EU. For example, many commodity trading firms are based in Switzerland, where they generate one third of world trade in crude oil. The Chicago Mercantile Exchange, which trades several financial instruments including interest rates, equities, currencies and commodities, has the largest number of options and futures contracts outstanding in the world. Detecting and sanctioning market abuse in such cross-border and cross-market situations will require international cooperation between financial and commodity regulators. This initiative will therefore require heightened international cooperation between regulators. ESMA could be required to facilitate such cooperation by preparing templates for memorandums of understanding that could be used by national regulators, who could be required to inform ESMA when they enter into such agreements.

6.5. Social impact

The options considered in this impact assessment will increase investor protection, thereby also benefiting institutional investors such as pension funds who invest in financial instruments in order to secure a higher rate of return for pension policy holders. It can be anticipated that greater market integrity will lead to higher investor confidence and greater participation in financial markets, thereby making it easier for enterprises to raise capital to grow and create more jobs. Employees who act as whistle blowers and report suspected market abuse to the authorities will also benefit from better protection.

6.6. Impact on human rights

An assessment was made of the policy options to ensure compliance with fundamental rights[158]. A detailed analysis for each policy option can be found in annex 8. The proposal is in compliance with the charter as it will lead to more effective and harmonised regimes for market abuse and insider dealing improving market integrity. To this end the policy options insure that access to telephone and data records, access to private premises, data on whistle blowing are subject to appropriate safeguards. These policy options will contribute to market integrity by facilitating the detection of market abuse within the EU. The proposed

[158] Based on COM (2010) 573, Strategy for the effective implementation of the Charter of Fundamental Rights by theEuropean Union, particularly the check list.

sanctioning regime will ensure that similar market abuses are sanctioned alike throughout the EU, unless differences can be objectively justified.

6.7. **Environmental impact**

It does not appear that the preferred options identified will have any direct or indirect impacts on environmental issues.

6.8. Estimated cumulative impact in terms of benefits and costs

Estimating the benefits of reducing an activity which is by definition illegal is very difficult and the benefits of addressing market abuse can only been determined indirectly. First, the size of the existing problem of market abuse needs to be estimated and second, the benefits, in terms of the estimated reduction of market abuse, should also be estimated. This methodology is described in more detail in Annex 12.

As explained in section 3.1.3, to determine the existing size of market abuse, the Commission services examined data from a study which attempts to quantify the cost of insider dealing, in terms of estimated profit gained from insider dealing[159]. Based on the total market turnover of equity markets, total market abuse is estimated at EUR 13 billion per year. To estimate the expected benefits to be achieved by applying the preferred policy options, we propose applying a conservative assumption that market abuse can be reduced by 20% due to the package of measures. This assumption is based on the experience of reinforced efforts to sanction market abuse in the UK (as part of the FSA's "credible deterrence" strategy) which has experienced a significant improvement of market cleanliness of 58% in the period 2008-2009[160]. In order to take a conservative approach to estimating the extent to which the preferred options could reduce market abuse, it seems reasonable to reduce this figure to 20%. Using this assumption, the benefits of the package of measures are estimated at EUR 2.7 billion per year. A more detailed description of the calculation of the benefits can be found in Annex 12.

In order to determine the cost implications of the package of preferred policy options in this report, a study was carried out for the Commission by external contractors to estimate the impact of the possible changes to the Market Abuse Directive, particularly in terms of administrative burden, which has been summarised in section 6.9. The administrative burden impacts outlined in annex 6.9 are considered the main cost implications of the package of retained options, particularly for industry stakeholders.

In addition, the Commission services assessed the additional cost implications of the proposal, with regard to the transposition and supervision of the new rules by Member States. With regard to the compliance costs for Member States, the preferred options are expected to create some limited additional costs to conduct market surveillance. For large markets (including UK, FR, DE, IT, ES), the Commission assumes that this would require up to 3 Full Time Equivalents (FTE's) and for the remaining smaller markets, it is expected to require 1 FTE in

159 Capital Markets CRC Limited, *Enumerating the cost of insider trading,* unpublished, 2010, p. 8.

160 Market cleanliness in terms of abnormal pre-price announcements decreased from 10% to 4,2% in the period 2008-2009, Financial Services Authority, Annual Report 2009/2010, p35-36, table 2.2, the measures of market cleanliness for the FTSE 350, available at http://www.fsa.gov.uk/pubs/annual/ar09_10/ar09_10.pdf

addition to EUR 20.000 annual costs for surveillance systems. Based on this the compliance costs as outlined in more detail in Annex 12 is estimated at EUR EUR 3,2 Million per year for all Member States.

Based on the above, the total package is expected imply a net benefit to the European economy. The results of the analysis of the expected costs and benefits of the package of retained options are presented in table 3.

Table 3. Summary of costs and benefits of the package of retained options

	Recurring (Million EUR)	One-off (Million EUR)
Benefits	**2.667, 4**	
Costs		
Compliance costs	3,2	
Administrative burden	297	320
Total Costs	**300,2**	**320**
Net Benefit	**2.367,2**	

The annual benefits in terms of the reduction of market abuse are estimated at EUR 2.7 billion annually, and the annual costs are estimated at EUR 300 million (plus in the first year estimated one-off costs of EUR 320 million to comply with the information obligations). Therefore the package of preferred policy options is expected to generate **net benefits of an estimated EUR 2.4 billion per year.**

6.9. Estimate of impact in terms of administrative burden

In order to evaluate the administrative burden of the policy options, an external study[161] was conducted by EIM on behalf of the Commission. The methodology of the study is based on the application of the Standard Cost Model (SCM) to determine the administrative burden caused by legislation. To determine the impact of new rules, interviews have been conducted with relevant stakeholders including financial markets, banks and investment firms and issuers including SMEs. Particular attention was given to impact of administrative burden on SME issuers.

The preferred options which are estimated to have an impact on administrative burden are the following: extending the scope of the MAD to MTFs and other organised trading facilities; extending suspicious transaction reporting to suspicious orders and suspicious OTC transactions; requiring issuers to notify competent authorities ex post of delays to disclosure of inside information; harmonising the requirements for insider lists; exempting SMEs from the requirement to keep insider lists; and harmonising the conditions for reporting of managers transaction reports, including increasing the threshold.

161 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010.

The outcome of the study for the chosen policy options is shown in table 4 below. Extending the rules to new market venues or instruments such as MTFs, suspicious OTC transactions and orders, and requiring issuers to notify delayed disclosure of inside information will lead to an increase in administrative burden proportionate to the objective of reducing market abuse. In addition, introducing an SME regime for disclosure of inside information and an exemption for SMEs from the obligation to report insiders' lists will lead to a reduction in administrative burden for SMEs. This effect remains small due to the limited amount of SME issuers operating within the EU. Limited effects are expected from harmonising managers transaction reports. In light of the above, the revision of the MAD in terms of administrative burden is estimated to be of the order of EUR 297 million recurring cost. In addition a one off cost for complying with the information obligation is estimated at EUR 320 million. A more detailed analysis on the administrative burden can be found back in Annex 10.

Table 4: overview of admin burden of the MAD

Policy option	description	Incremental cost per entity (EUR)			Total incremental cost (Million EUR)	
			Admin burden	One of cost to comply with information obligation	Total admin burden (million EUR	Total one of cost to comply with the information obligation
5.1.4	Extending scope to MTFs		4,810		0.2	0.3
5.1.5	Extening scope to OTFs		4.810		0.5	
5.3.2	reporting of suspicious OTC transactions and orders	OTC	11,250	11,250	29	29
		Orders	28,000	56,000	145	291
		Total			147	320
5.6.3	Reporting of delayed disclosure	LE	17,550		127	
		SMEs	1755		1.8	
		Total			129	
5.7.2	SME regime for disclosure of inside				-1.1 (reduction)	

	information					
5.7.4	Harmonisation of insider lists		2,025		-1.2 (reduction)	
5.7.5	SME exemption for insiders lists		945		-1.8 (reduction)	
5.7.8	Harmonisation of managers transactions reports	Large issuers	405		-2,2 (reduction)	
		SMEs	135		-0.1 (reduction)	
Overall admin burden					297	
one-off cost to comply with information obligation						320,3
Admin burden on SMEs					-1.2 (reduction)	

7. MONITORING AND EVALUATION

The Commission is the guardian of the Treaty and therefore will monitor how Member States are applying the changes proposed in the legislative initiative on market abuse. When necessary, the Commission will pursue the procedure set out in Article 226 of the Treaty in case any Member State fails to respect its duties concerning the implementation and application of Community Law.

The evaluation of the consequences of the application of the legislative measure could take place three years after the entry into force of the legislative measure, in the context of a report to the Council and the Parliament.

The main indicators and sources of information that could be used in the evaluation are as follows:

- Data from national competent authorities on the number of market abuse cases they have investigated and sanctioned; and
- A report (which could be undertaken by ESMA) on the experience gained by regulators in enforcing the legislation.

ANNEX 1 - RELATED INITIATIVES

As announced in its Communication of 2 June 2010 on Regulating Financial Services for Sustainable Growth[162], the Commission will complete its full financial reform programme in the coming months. Of the existing or pending proposals listed in the Communication, a number are related to this initiative and will contribute to achieving its objectives of improving investor protection and enhancing market transparency and integrity.

The proposal for a Regulation on short selling and certain aspects of Credit Default Swaps[163] includes a short selling disclosure regime which would make it easier for regulators to detect possible cases of market manipulation or insider dealing linked to short selling.

The proposal for a regulation on OTC derivatives, central counterparties and trade repositories[164] will also increase transparency of significant positions in OTC derivatives which will assist regulators to monitor for market abuse through the use of derivatives.

The review of the Markets in Financial Instruments Directive[165] will consider options to widen the current scope of reporting in relation to transactions in instruments only traded on multilateral trading facilities (MTFs) and reporting on over the counter (OTC) transactions including derivatives. The reporting to competent authorities of OTC transactions in instruments not admitted to trading on a regulated market is not currently mandatory, and such reporting would make it easier for regulators to detect possible market abuse through such instruments.

The issues of transparency requirements and manipulative behaviours specific to physical energy markets, as well as transaction reporting to ensure the integrity of energy markets, are the subject of the Commission proposal for a Regulation on energy market integrity and transparency[166].

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162 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank, *Regulating financial services for sustainable growth*, COM(2010) 301 final, 02.06.2010, p. 7.

163 Proposal for a Regulation on Short Selling and certain aspects of Credit Default Swaps, COM (2010)482 final, 15.9.2010

164 Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, COM(2010) 484 final, 15.9.2010

165 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

166 See public consultation on the DG ENER initiative for the integrity of energy markets, http://ec.europa.eu/energy/gas_electricity/consultations/2010_07_23_energy_markets_en.htm

ANNEX 2 – SUMMARY OF CONTRIBUTIONS TO PUBLIC CONSULTATION

Overview of Respondents

The consultation raised interest and presented diverse comment among a broad range of stakeholders. A total of 98 responses were received including some joint responses. Responses were categorised into the following broad definitions shown in **Figure 1** and are summarised in the following section.

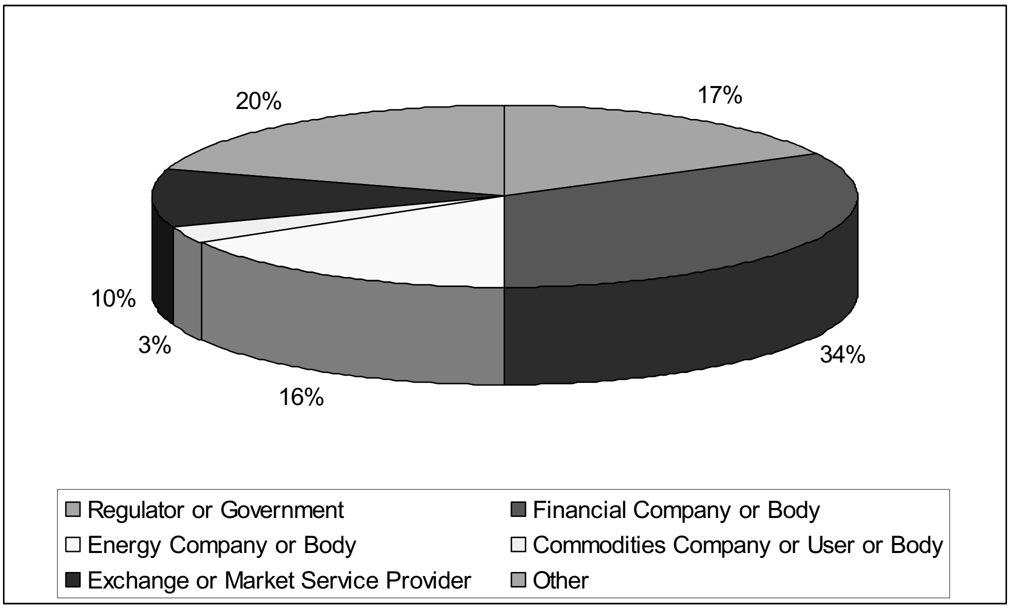


Figure 1. Chart of respondents to MAD consultation

Section A – Extension on the scope of the directive

1. Alignment of the definition of inside information relating to commodity derivatives

1.1. Approximately one third of respondents were in favour of a general expansion. This included strong support from regulators. There was strong opposition from energy companies and associated bodies, whilst approximately one third of respondents had no strong opinion.

1.2. The majority of all respondents agreed, to differing extents, that there are key differences between commodity markets and financial markets; although opinion on how this impacted the suggested alignment was diverse. In particular one respondent noted that for regulation to be effective there needs to be strengthened co-operation between physical market regulators and financial regulators.

1.3. The majority of supporting respondents agreed with the Commission services' analysis in that there was a need for increased transparency, that the current definition was too broad and there needed to be harmonisation. However, several

other reasons were cited in favour of the expansion. These included its inclusion in the G20 agenda, the susceptibility of commodity markets to "cornering" and other abusive practices and the significance of derivatives to the underlying commodity market.

1.4. Approximately one third of all respondents did not support an alignment of the definition of inside information for commodity derivatives. The main objections centred on the view that it was not appropriate to translate a financial regime directly across to a commodity market. While there was limited detail on the specific impact these changes would have on the current operation of MAD in the commodity (derivatives) market, some important issues were raised:

- Most financial instruments are issued by single bodies, and inside information generally relates to this issuer. By contrast in commodity markets, inside information is much wider ranging e.g. from weather predictions to mining or production forecasts.
- Some felt that the consultation did not provide convincing arguments that there is a sufficient problem to require the expansion of scope; and
- Some noted the difference between the commodity derivatives market and the physical underlying markets.

1.5. Responses from energy companies and associated bodies raised concerns with the impact the alignment could have on energy markets (power, gas, CO2 etc), and were against a direct translation of the definition. These respondents reiterated the advice previously given by CESR/EGREG[167] and ESME[168] in 2008, noting some of the key differences in financial and energy markets (e.g. physical fundamentals such as generation and storage[169]). Several respondents noted possible side effects the alignment may present, such as undermining the incentive to invest in infrastructure (as a firm would not be able to extract any value from information flow relating to it).

1.6. Respondents from the energy sector supported coordination with the DG ENER proposal on integrity and transparency in energy markets.

2. Extension of MAD to attempts at market manipulation

2.1. Overall, there was agreement with the Commission services' analysis and the majority of those respondents who expressed an opinion were in favour of the proposed extension of the MAD regime. However, respondents were generally also concerned about the need to improve the clarity of the proposed definition as they felt this needs to be very clear about the elements of the offence and what must be proved. Some respondents questioned how intent would be proven on a practical level.

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167 CESR/EGREG advice to the European Commission in the context of the Third Energy Package, 2008.
168 Advice by the European Securities Markets Expert Group on commodity derivatives business, 2008.
169 European Regulators´ Group for Electricity and Gas

2.2. A small minority of respondents were not in favour of the general expansion, commenting that they felt the current provisions in the MAD were sufficient, that expansion would divert Competent Authorities' time and resources to cases that do not harm integrity, that the approach is not consistent with the MAD (effects based) regime and that it could cause legal uncertainly.

3. Extension of MAD to include manipulative actions committed through derivatives.

3.1. Over three quarters of respondents who expressed an opinion expressed support for the extension to cover derivatives. In addition to the reasons cited by the Commission services, some respondents pointed out that this is already in place in some member states and would lead to a more harmonised regulatory regime.

3.2. There was limited opposition, and some respondents felt that the current regime already covered these products to a sufficient extent.

4. Application of MAD to instruments admitted to trading on MTFs.

4.1. There was strong support for the extension of MAD to instruments solely traded on MTFs. Respondents acknowledged the growth of MTFs and their significance in current markets.

4.2. While there was agreement on the general application, a number of respondents detailed how Member States had already modified local regimes to accommodate specialist MTFs; for example specialist SME markets. These respondents felt that current bespoke regimes for these MTFs were appropriate, that harmonisation would need to encompass these different evolutions, and that this may be a difficult task.

4.3. Although agreeing with the proposal in principle, some energy companies (in line to their responses to question 1) considered it inappropriate to apply the regime to energy markets and associated derivatives traded solely on MTFs.

4.4. One respondent felt that MAD should not apply to any issuers who had chosen to list on an MTF as this would remove their attractiveness to SMEs.

5. Disclosure of inside information for issuers who only have instruments listed on MTFs .

5.1. In general, there was limited support for any reduction in the requirements to disclose inside information. Respondents from all areas felt that disclosure requirements were essential to market integrity, and that they should not be compromised.

6. Adapted regime for SME issuers admitted to trading on regulated markets and/or MTFs

6.1. Over half of the respondents did not express a strong opinion, although a number of these commented that further analysis should be conducted. Approximately a quarter of respondents did not feel a specialist regime was necessary, whilst approximately one fifth supported a specialist regime.

Supportive of an adapted regime for SME issuers

6.2. Those supporting a specialist regime felt that it was essential to give SMEs access to finance in order to encourage growth in the SME market. Further, it was felt that a proportionate regime would appropriately reflect the difference in size between SMEs, who have limited resources, and larger firms, who command more resources, whilst striking a balance of consumer protection. These respondents generally favoured the application of secondary market aspects of the MAD but considered it proportionate to modify some of the primary market requirements – such as insider lists and directors dealings obligations that apply to issuers.

Not Supportive of an adapted regime

6.3. Of the approximate quarter of respondents who did not support a specifically adapted regime, most felt that MAD was a cornerstone of financial market stability and that reductions in its scope could reduce investor protection which they feel is critical to EU markets. Some of these respondents felt that the risks of market abuse are not necessarily smaller with SME's, that the regime is not considered unduly burdensome, that there could be possible incentives for regulatory arbitrage and that investors in these markets need the same level of protection as for the issuers traded on Recognised Markets.

To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive?

6.4. There was little support for basing an adaptive regime on the size of the firm. Only a limited number of respondents specifically felt the regime should be harmonised with the transparency and prospectus directives.

6.5. Rather, a number of respondents felt it would be more appropriate to apply the regime on a market by market basis. A number of reasons for this were cited, including:

- Ensuring that retail consumers and market users could sufficiently distinguish the difference in risk of the specialist regime;
- Ensure that all issuers trading on the same market are subject to the same rules; and
- Enabling issuers to choose which market they are traded on and the respective level of disclosure and organisational requirements that are appropriate to their size.

A number of respondents also commented that specialist applications of MAD, on a market by market basis, are already in effect in a number of Member States, including Ireland, the UK and France (such as ESM and GEM in Ireland, AIM and PLUS in the UK, and Alternext in France).

To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

6.6. This question was largely unanswered by respondents.

Section B – Enforcement Powers and Sanctions

7. How can the powers of competent authorities to investigate market abuse be enhanced?

7.1. Responses from regulators and member states generally differed from those of industry participants. A number of respondents noted that some regulators already used the proposed powers.

7.2. Regulators and member states considered the following key areas of enhancement:

- The removal of barriers in other legislation (including the directive on privacy and electronic communications);
- Establish the capacity to settle cases;
- Implement cross market position limits in MiFID;
- Extending Transaction reporting to OTC and derivatives including harmonisation of client and trader IDs and increased use of algorithms; and
- Competent Authorities should have access to platforms' orderflow, either through transaction reporting or through a feed from the trading platforms.

7.3. Some industry participants responded that competent authorities should make better use of existing information they receive and current powers, including ensuring all competent authorities apply their full powers (e.g. require all firms to record relevant telephone conversations).

Extension of suspicious transaction reporting to orders and OTC transactions?

7.4. Generally, respondents supported an extension of the suspicious transaction reporting regime to include orders and OTC transactions (over three quarters of respondents who expressed an opinion supported the extension).

7.5. Regulators and member states were strongly in favour of an extension, and while most other respondents also supported the extension, a number raised potential issues as to the increased costs and its practical implementation (no specific details of costs were presented).

7.6. Several responses (from financial institutions or bodies) commented that intermediaries are not generally aware of a client's intention and that further definition of the requirements would be helpful.

8. Review of sanctions - how can sanctions be made more deterrent?

8.1. Respondents generally supported harmonisation of sanctions at the EU level as a means to increase their deterrence effect.

To what extent need the sanction regimes be harmonised at the EU level in order to prevent market abuse?

8.2. There was support for harmonisation of administrative sanctions at the EU level, with respondents noting that at present sanctions differed greatly between Member States and that Member States should enforce and apply MAD in a more consistent and harmonised way, with a view to reducing regulatory arbitrage.

8.3. However there was also some potential uncertainty as to the practicality of complete harmonisation, especially due to the differences in markets between Member States.

8.4. There was limited specific discussion of harmonisation of criminal sanctions. Two respondents felt that penal measures should be left to member States, whilst others noted the difficulties of implementing regimes in criminal law. One respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another.

Administrative measures and sanctions

8.5. Over three quarters of respondents did not have a strong opinion on the proposed clarification of administrative measures and sanctions.

8.6. In relation to the setting of minimum levels for financial penalties, respondents had mixed views. While there was a general consensus supporting minimum levels the following points were also made:

- Categorisation of financial penalties may lead to situations where a fine is too small or large;
- A financial penalty should be proportionate to the seriousness of the breach, but as no two breaches are the same a prescribed minimum fine is not appropriate;
- There should also be a corresponding maximum fine level;
- Standardised fines are only appropriate for certain standardised violations, such as failure to update an insider list; and
- One respondent felt the minimum should be three times the loss avoided or profit gained.

8.7. Rather than set levels, there was some support for ESMA to provide guidance on appropriate levels.

8.8. Some respondents referred to the UK FSA which had recently assessed its financial penalty regime and introduced a new framework based on the following criteria - (1) disgorgement; (2) assessing the seriousness of the conduct; (3) adjusting for aggravating or mitigating factors; (4) adjustment for deterrence; and (5) settlement discount.

8.9. In relation to public disclosure of sanctions, one respondent felt that this could disproportionately affect trust in capital markets and give misleading signals (and

also contravene data protection rules), whilst other respondents supported the measure but noted that there may be occasions when public disclosure may be inappropriate.

8.10. Some respondents also noted the need to consider sanctioning proposals with regard to the "ne bis in idem principle" (the right not to be tried or punished twice for the same offence) in relation to applying both administrative and penal measures for the same offence.

9. Role of ESMA

9.1. Over three quarters of respondents did not have a strong opinion on the proposed narrowing of the reasons for which a competent authority may refuse to cooperate with another.

9.2. Of those who did respond, responses were mixed. Those not supporting the narrowing sought clarification of the reasoning of the proposals, and highlighted concerns over data protection. Those who supported the measure felt it would enhance co-operation.

9.3. Respondents to the consultation were supportive of ESMA having a co-ordination role for enforcement purposes; however there was limited support for any further powers or involvement in specific cases.

10. Cooperation between European and Third Country Regulators

10.1. There was widespread response from all categories of respondents to this topic; whilst most provided some specific individual views the following areas of consistency were noted:

- There was wide acknowledgement that the current IOSCO agreements were appropriate and worked well. A number of respondents felt these would be a positive base from which ESMA could perform a coordination role; and
- ESMA could set rules or guidelines on how data should be shared both within the EU and the 3rd country framework.

Section C – Single Rule Book

11. Power to decide the delay of inside information

11.1. A number of responses mis-interpreted this question, considering the case in terms of all disclosures of inside information, rather than just those in the case of emergency funding.

11.2. Of those who did respond to the question directly, the following views were presented:

- Whilst there was some support for regulators to have the power directly, the majority of respondents (across all categories) felt that while the proposal was

beneficial, the issuer itself rather than the competent authority should have the appropriate responsibility;

- Some respondents felt this could be done by the competent authority granting a waiver from the disclosure rules;

- One respondent felt that the trigger should not be if the institution is systematically important, but rather if the information is systematically important; and

- Respondents also noted that at times of emergency, regulators and issuers would already be involved in close communication.

12. Should there be greater coordination between regulators on accepted market practices?

12.1. The majority of respondents, including financial companies and bodies, supported enhancing harmonisation, although they also noted the difficulties of completing this. These responses generally felt harmonisation would help move towards a single market for financial instruments and would reduce legal uncertainty for market participants. However respondents also commented that significant differences in markets currently exist, which justify divergent implementations of accepted market practices.

12.2. While some public authorities felt involvement by ESMA in a co-ordination role would help, most felt that the current procedures were sufficient, and that further harmonisation would offer little benefit.

12.3. One respondent commented that although they would support the proposal in principle, it may "give more freedom to competent authorities to create new AMPs, which would be against the spirit of the internal market and the creation of a single rulebook".

13. Do you consider that it is necessary to modify the threshold for the notification to regulators of transactions by managers of issuers?

13.1. While more than half of respondents did not have a strong opinion in relation to this question, the majority of those who did felt the threshold should be increased.

13.2. The respondents supporting an increase (including large support from financial institutions and bodies) generally felt that the current threshold was too low. The following rationale was provided:

- There is a large administrative burden in relation to applying the threshold and notifications; and

- The low threshold means that many transactions will be reported, which may possibly increase noise in the data.

13.3. However there were a number of respondents who opposed an increase of the threshold for the following reasons:

- The threshold should be kept at €5000 (or reduced), as this enables the market and investors to have sufficient data to make its own judgements. This is in line with the objectives and principles of the MAD;

- Having a large amount of data is not an issue as the market can easily analyse and filter transactions; and

- Applying a rule based on a defined single figure for all institutions may not be proportionate considering the vastly differing sizes of issuers.

13.4. Respondents also provided the following comments:

- There was support for the threshold to be set in level 2 measures and for ESMA to be given the power to review the threshold, in the future;

- One respondent provided data showing the difference in impact the threshold would have on a large issuer compared to a smaller issuer; and

- Several respondents noted that the threshold was currently implemented at the discretion of the member state under the directive, and that some member states had not implemented a threshold (e.g. UK).

Is a threshold of Euro 20,000 appropriate?

13.5. In line with the mixed responses to the previous question, there was no conclusive view as to whether €20,000 is an appropriate threshold. Many respondents supported the threshold, however some also felt a higher threshold was necessary, whilst others felt a lower threshold was more appropriate.

14. Do you consider that there are other areas where it is necessary to progress towards a single rulebook? Which ones?

14.1. Suggestions raised by respondents included:

- There are potentially differing understandings of the buy-back regime, and this should be discussed, possibly by CESR/ESMA.

- Firms should be given the means to check whether a prospective employee was previously convicted of market abuse.

- The content of suspicion transaction reports should be harmonised·

- There should be level three guidance for circumstances of deferred disclosure, especially on the criterion "not likely to mislead the public".

- From the employee perspective, ensuring sound and efficient “whistle blowing systems” could be an appropriate measure, also in relation to disclosing e.g. market abuse practices.

- EC should review the issue of "using inside information" as raised in Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-Financie- en Assurantiewezen.

15. Clarification of the obligations of market operators to better prevent and detect market abuse?

15.1. Respondents generally supported clarification, although some noted the difficulties that a trading venue may have in monitoring its market – such as market fragmentation and multiple listings, sharing of data, and understanding the reasoning of transactions.

ANNEX 3 - SUMMARY OF PUBLIC HEARING

Market Abuse: Promoting deterrence, market integrity and investor protection

Public Hearing on the Revision of the Market Abuse Directive

2 July 2010

Keynote speeches

Jonathan Faull, Director General, DG Internal Market and Services welcomed delegates to the public hearing. He explained that the MAD review formed part of a broader set of initiatives, which included the review of MiFID as well as initiatives on derivatives and market infrastructure, short selling and credit default swaps. Further, that all of these initiatives are interlinked and the Commission aimed to make sure that they complement and strengthen each other. Therefore, the revision of MAD is one part of the Commission's overall programme for regulating financial services, the overarching objective of which is to create robust, reliable and transparent markets, to regain investor confidence and to create a sustainable economic model which will drive our economy out of the current crisis.

Sharon Bowles MEP and Chair of the Committee on Economic and Monetary Affairs of the European Parliament gave the second keynote speech. She discussed the review of the MAD under the three themes of transparency, clarity and harmonisation. She raised the issue of extending directive coverage to instruments traded solely on MTFs and providing greater clarity that credit default swaps are covered under the scope of the Directive. In the context of debate about the use of naked credit default swaps she highlighted the difficulty of separating out what is a legitimate use of such an instrument from other uses. She thought greater transparency about the holding of these instruments is what is important. This would also prevent some of the uninformed speculation about speculation. She supports greater publication by regulators of information about sanctions imposed for market abuse. There is no excuse for regulators not publicising such information. Regarding physical markets she suggested that although there are often differences between physical and financial markets, it is important to have a complete picture of both markets. She thought short selling issues should be addressed separately from the MAD. She also discussed the possibility of adjusting the scope of insider lists. These lists are important but, for example, small businesses might be exempted from routine maintenance of an insider list and instead required to provide information to supervisors on demand. Finally she advocated greater clarity about when there can be delayed disclosure of inside information about an institution of systemic importance and also supported extending coverage of the Directive to include attempts at manipulation.

Carlos Tavares CMVM Chair and vice-chair of CESR gave the final keynote speech and considered that the MAD needed to be extended beyond regulated markets, that the definition of financial instruments should be aligned with the MiFID definition and that it should be clarified that the Directive applies to derivative instruments such as credit default swaps. He suggested there should be more stringent and consistent regulation of financial analysis and of requirements for journalists when quoting third parties' opinions. He gave examples of divergent approaches to the application of MAD in Member States and suggested that options

and discretions should be reduced. He also supported removing uncertainties about the rights of regulators to gain access to telephone records and thought that MAD should be amended to make suspicious transaction reports on OTC derivatives mandatory. He expressed views about possible measures on short selling. Finally he talked about the need for greater harmonisation of sanctions for breaches of the MAD.

Summary of panel 1: Ensuring comprehensive and appropriate coverage of derivative markets in the MAD

Maria Teresa Fabregas Fernandez, from the Commission, stressed the growing importance of derivatives, the serious influence they have in the physical markets and the opaqueness of the OTC space.

Alexander Justham (FSA, UK) emphasised that a holistic regime was necessary in order to ensure market integrity, as the interaction between the derivatives and underlying markets was constant in both directions. He also explained that there was a clear distinction between market abuse and speculation, the latter is not contrary to the MAD. Nadège Jassaud (ESCB CDS Taskforce, Banque de France) stated that the scope of the MAD needed to be clarified, as it had been drawn up for equity markets, and increased transparency was needed. Stephen Obie (CFTC) explained that prosecuting attempts at market manipulation was important, and that information sharing between regulators world-wide was essential.

In response to a question on the importance of transaction reporting to trade repositories, Mr Obie stated that this would help as it would deter wrongdoing and help regulators to detect the motive for market abuse. Mr Justham commented that a large number of OTC transaction reports (5-10 million per day) were received by the UK, so a system would have to be built to deal with such a vast number of reports.

With regard to concerns about the possible impact of Credit Default Swaps on sovereign bonds markets, the panel agreed that access to data was important to investigate such cases, including that available from the DTCC and telephone or email traffic. On the question of whether a specific framework was needed for commodity derivatives, Mr Obie argued that it was vital for regulators to work together, and Mr Justham explained that the definition of insider trading in commodities could not simply be translated from that for equities.

Concerning the issue of rumours, Carlos Tavares (CESR) argued that journalists should be required to identify their source to a regulator investigating a suspected case of market abuse. Stephen Obie explained that the CFTC had sometimes gone to court to obtain information from journalists, and Charles Cronin agreed that journalists using inside information in their articles should have to reveal their source.

Summary of panel 2: Closing the remaining regulatory gaps

Tim Binning, from the Commission, gave a brief introduction about the main issues in the consultation paper relating to reducing regulatory gaps.

Michael McKee (DLA Piper) gave some historical background and context about the MAD. He explained for example that it predated the commencement of the Markets in Financial Instruments Directive which is why its scope mainly focussed on financial instruments traded on a regulated market (as regulated market was the main concept at the time and the concept of a MTF was introduced only when MiFID commenced). He also pointed out that MAD does

currently cover trading of instruments when traded outside a regulated market (e.g. on a MTF or over the counter). But it does not cover instruments only admitted to trading on a MTF. He also explained that some Member States already extend their regimes to cover instruments admitted to trading on a MTF.

Fabrice Peresse (NYSE Euronext) explained the view from the perspective of the operator of large exchanges. He thought it appropriate to extend the MAD prohibitions to cover instruments only traded on other organised trading platforms such as MTFs. He raised the issue of differences between operators of regulated markets and MTFs regarding the surveillance systems and methods they use to monitor and detect market abuse. He was concerned these are not always of the same level which can result in some operators incurring greater costs. He also discussed the potential difficulty that has arisen for monitoring market abuse of a financial instrument now that trading in a single instrument is now spread across a number of different financial markets (post MiFID). Previously, real time monitoring was done by a single exchange but now a single venue could not see all the trading of a single instrument. There was discussion about whether this is an issue that can be resolved through the CESR information sharing systems such as TREM or through greater cooperation between regulated markets.

Duncan Wales (ICAP) welcomed the aims of the MAD review, but stressed the need to take into account the nature of existing MTF's and the wide range of different markets, financial instruments and issuers those MTFs represent. In OTC markets, MTF's are the evolution of bilateral and voice-brokered means of trading, and in many cases even with full electronic capability available, several perform as "hybrid" markets, where liquidity on the MTF is enhanced and encouraged by voice broking. The original design of MAD was based on centralised equity markets, and great care should be taken in applying the directive to include all the diverse asset classes traded on MTFs without significant modifications. It is, for instance, difficult to draw a direct comparison between disclosures required for an issuer of stock (and therefore what might constitute inside information) and disclosures required in OTC money and rates products, which correlate to macro-economic, monetary and political factors (would central banks and governments be caught by the same regime?).

Jose Sanz De Gracia (CNMV, Spain) spoke of his experience as a regulator of dealing with the MAD. Regarding the issue of whether there may be a technical regulatory gap for attempts to manipulate the market he was not convinced from his experience that there was a significant problem. It has been suggested that the existing legislation requires regulators to prove that conduct actually had an effect on the market (which is a high onus). Mr Sanz de Garcia thought that the existing legislation can often cover such situations without having to prove the effects of an attempt on the market. Therefore he was less sure about the need for a new provision defining and prohibiting attempts to manipulate the market.

Summary of panel 3: Powers of competent authorities and sanctions

Bertrand Legris, from the Commission, made a short introduction to stress the major points of the consultation document on those topics.

Anastassios Gabrielides (President of the GCMC and of CESR-Pol) insisted on the usefulness of extending the scope of suspicious transactions reports, along the lines proposed by the Commission (to orders and derivatives). He emphasized the importance for regulators of getting telephone data and on the existence of some difficulties in some Member States in this

regard. He favoured a role for ESMA in helping requesting authorities to get data needed from requested authorities, notably through binding mediation. He stressed the necessity of having fines proportionate to the importance of the abuse and in particular based on the advantage obtained from it.

Tracey McDermott (Deputy of the head of the enforcement division of the UK FSA) explained the new approach of the FSA in tackling market abuse ("credible deterrence") and its recent achievements. She indicated how important it was for competent authorities in the course of their investigations to be able to ask judges for authorisation to seize documents. She expressed the view that a clarification in the MAD about the conditions for accessing telephone data could be useful. She explained the criteria applied by the FSA in deciding the levels of fines (4 times the profit is a starting point that is then adapted to other criteria; 100.000 euros for individuals is also a principle which supports exceptions; the importance of the position of a person who committed an abuse, eg inside an issuer, needs to be considered closely). She considered that the proposal of the consultation to have a minimum sanction of twice the advantage from the infringement could probably not function without exceptions.

Laurent Combourieu (Deputy Head of enforcement division of the AMF) underlined the progress generated by the MAD, notably in terms of convergence in defining market abuse in Europe and in international cooperation. He explained however that MiFID has made the task more complex to detect abuse (in terms of manipulation across different platforms, reporting of trades, algorithmic trading, OTC transactions). He supported the proposals for covering manipulation through the use of derivatives, on Judges granting access to documents, suspicious transactions reports and the role for ESMA.

Elisabeth Jacobs (Deputy Director of the International division of the SEC) stressed the increases in the number of trades for a few years and the "new face of greed" and gave a few examples of recent successes in SEC investigations. She also notably stressed the need for cooperation between European competent authorities and the various US authorities.

A few questions were asked by the moderator and by the audience. Carlos Tavares (vice president of CESR) stressed the importance for regulators of understanding how algorithmic trading works.

Summary of panel 4: Moving towards a single rulebook/Reducing administrative burdens, especially on SMEs

Philip Tod from the Commission gave a brief introduction about the main issues in the consultation paper relating to the need to take into account the specificities of SMEs and how to ensure a more convergent implementation of the MAD.

Concerning SMEs, Fabrice Demarigny (partner in Mazars) highlighted that it was necessary to find the right balance between the general rule and a specific proportionate regime without undermining investor protection. He said that nowadays the costs of listing are higher than the benefits. For him, it was crucial to find the right definition of SME based on market criteria. He pleaded for a non-automatic extension of MAD to all companies listed in MTFs, leaving it to national law. He said that some basic principles of market integrity should be the same for all, but others, such as insiders' list and managers' transactions, could be calibrated to the size of the company.

Charles Cronin (Head of the Center for Financial Market Integrity) emphasised that a single EU rulebook was crucial for the pan-EU structure. He argued that nowadays SMEs are not disclosing enough information and thus have not enough liquidity; therefore he pleaded for the application of the MAD regime to SMEs.

Carmine Di Noia (Deputy Director General Assonime) highlighted that the MAD had not led to harmonisation across Member States of important issues like the definition of inside information subject to the disclosure obligation and the conditions for delayed disclosure. He was against the extension of the disclosure obligations in the MAD (and the Transparency Directive) to issuers traded only on MTFs. He proposed to move the disclosure obligation for issuers from the MAD to the Transprency Directive and to replace the definition of inside information for disclosure with "material information"; treatment of rumours should be inserted in the MAD.

Tim Ward (CEO, Quoted Companies Alliance) emphasised the need to take a holistic approach, requiring consistency within the Prospectus Directive, the Transparency Directive and MiFID and the obligation to report trades across the EU to a single venue.

Concluding remarks

Maria Velentza (Head of Unit, Securities Markets, DG Markt G3) concluded the hearing by saying that the MAD review should be ambitious making a real update and modernisation of the Directive, although without changing its initial objectives of market integrity and efficient surveillance.

The review should be holistic, avoiding the silo approach that had prevailed until now. The main changes would concern the following four areas:

– Filling the gaps. The Directive should capture as much as possible. Concerning the scope, it should go beyond the concept of regulated markets and equities to a broader concept of "organised market" and all financial instruments. Concerning the powers of regulators, it is necessary to enhance the investigatory powers of regulators and to deal with the attempts. Concerning the quality of supervision, more harmonisation and convergence in the field of sanctions is necessary to achieve a better deterrence.

– Transparency. It is necessary to enhance transparency both with regard to the information to regulators (to better check the integrity of the markets) and the information to the markets (to ensure correct investment decisions and have better confidence in the markets).

– Coherence with other policies. It is important to keep the consistency with other policies to ensure resilient financial markets, in particular in the field of commodity derivatives. It is necessary to avoid duplication of requirements and to avoid gaps in the legislation, taking into account broader macroeconomic considerations of market stability.

– International coherence. More cooperation has to be sought among EU regulators and with other jurisdictions. The creation of the European Securities and Markets Authorities (ESMA) will help in this process.

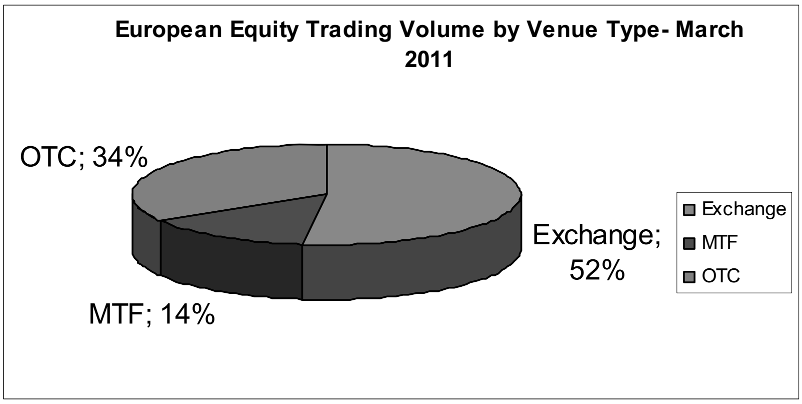
ANNEX 4 – EUROPEAN TRADING ESTIMATES

The following provides a high level overview of EU trading venues, split into equity, debt and derivatives.

1. EU EQUITY MARKETS

1.1. In Europe, secondary market equity trading mainly takes place on regulated markets (RM), over the counter (OTC), and multilateral trading facilities (MTFs). To a lesser extent, equities are also traded on broker crossing networks and systematic internalisers (SIs).

1.2. In March 2011, the European equity market turnover was approximately €1,885 Billion[170]. Of this, approximately 52% was conducted on traditional stock exchanges, 14% on MTFs and 34% via bilateral OTC arrangements, which includes SI's (at about 2%) – see chart below. It should be noted that in 2010, total trading in EEA shares amounted to €18.7 trillion in 2010 with OTC trading accounting for 37%[171].



1.3. The data shows RM and MTF trading accounting for approximately 66% of total equity trading whilst MiFID OTC trading accounts for approximately 34%. However it must be noted that OTC refers to a broad range of trading, ranging from pure bilateral trading (considered more traditional OTC), to more organised arrangements (such as OTC initiated through an exchange, SIs and broker crossing networks – see below), therefore caution must be applied to considering this figure as an absolute.

1.4. Since their introduction in 2007, MTFs[172] have undergone large growth, and now occupy a significant proportion of the European equity market turnover. Estimates based on the above data show that MTFs (such as BATS Europe, CHI-X, Turquoise,

170 Thomson Reuters Monthly Market Share Report, March 2011.

171 All European Equities Market Activity by Trade Type (January 2010 to January 2011), Thomson Reuters, 2011

172 There are currently 138 Multilateral Trading Facilities authorised in the EU, with several equity MTFs dominating their total volume – see Annex 4 for details.

Burgundy etc) currently account for approximately 10% of total European equity trading volume.

1.5. Systematic Internalisers (SIs) were also introduced in 2007[173], however they have not seen as significant a growth as MTFs - currently only 12 SIs are registered with competent authorities. Trading on SIs is generally reported as part of OTC statistics. CESR data suggests that they do not represent a large proportion of equity trading within Europe – with estimates in the region of 2% of all European equity trading[174]. A breakdown of the currently registered SIs and an indication of their trading landscape (taken from CESR data) is given below:

Investment Firm	Competent Authority	Number of shares which the SI provided a quote for and traded in Q4 2008	Total volume Q4 2008 Turnover
Royal Bank Of Scotland N.V. (Formerly ABN AMRO BANK N.V.)	AFM	1305	£18,834 million
BNP Paribas Arbitrage	AMF	42	£7 million
Citigroup Global Markets	FSA	478	£22,438 million
Citigroup Global Markets U.K. Equity	FSA	172	£7,174 million
Credit Suisse Securities Europe	FSA	705	£33,234 million
Danske Bank	Finanstilsynet	80	DKK 6,044 million
Deutsche Bank Aktiengesellschaft, Frankfurt/Main, Germany	BaFin	792	£14,033 million
Goldman Sachs International	FSA	98	£179 million
Knight Equity Markets International (Started Jan 09)	FSA	n/a	n/a
Nomura International (Formerly Lehman Brothers)	FSA	n/a	n/a
Nordea Bank Danmark A/S	Finanstilsynet	20	DKK 7,513 million

173 Systematic Internalisers (SIs) are trade matching systems run by investment firms - see Glossary in Annex 5 for details.

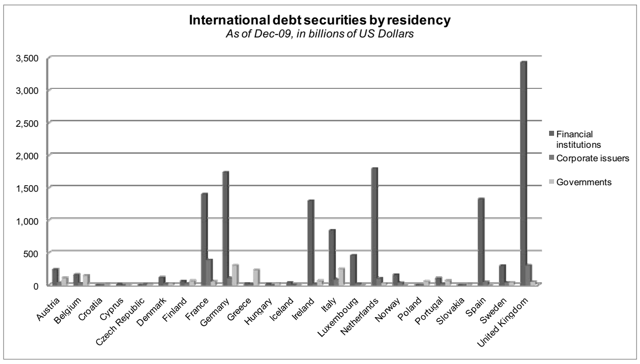
174 CESR publication - Impact of MiFID on equity secondary markets functioning. Based on data from Q4 2008. http://www.cesr-eu.org/data/document/09_355.PDF

UBS and UBS AG (London Branch)	FSA	827	£29,536 million

1.6. Broker crossing networks[175] are not subject to the same levels of transparency as RMs and MTFs, and their trading is also generally considered OTC. Whilst this opacity has led to some speculation of size (with some parties believing this is significant), CESR conducted a survey in 2009 of 11 investment firms from 4 jurisdictions which found that actual trading through these systems was *"very low, ranging from an average of 0.7%* [of total EEA trading] *in 2008 to an average of 1.15% in 2009 (increasing to 1.4% in the last two quarters of 2009)"*[176].

2. EU DEBT MARKETS

2.1. In terms of total debt outstanding, financial institutions and corporates raised a total of $8,604.8 billion on the domestic (European) debt Market, compared to $14,761.3 billion raised on the international debt market as of December 2009[177]. A breakdown of outstanding domestic and international debt securities (financial, corporates and governments) is shown below.



2.2. Unlike equities, corporate and financial bonds are not as actively traded (fixed income markets seek more long term goals and instruments are generally held to maturity); the trading landscape is therefore dominated by government bonds. Estimates show in the region of 27% of daily traded debt relates to non-government bonds compared to 73% for government bonds[178].

2.3. While trading is dominated by government debt, this is primarily traded OTC and is rarely listed on exchange. Rather, approximately 97% of EU bond listings relate to non-

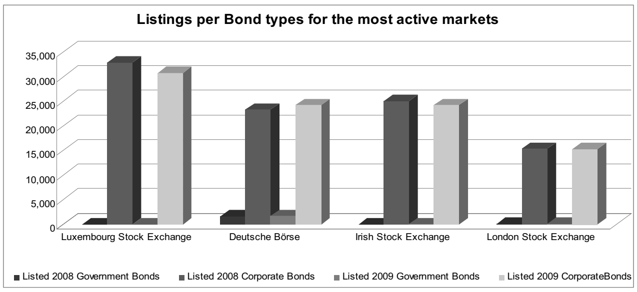
175 See Glossary in Annex 5 for details.

176 CESR Technical Advice to the European Commission in the Context of the MiFID Review - Equity Markets. http://www.cesr-eu.org/data/document/10_394.pdf

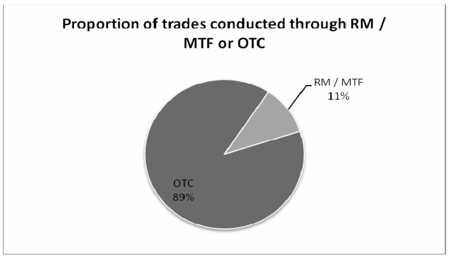
177 PWC estimates from their report prepared for Commission services.

178 Celent, October 2009 “Electronic Trading of Bonds in Europe – Weathering the storm”

government debt (both on the domestic market and debt issued on the international bond market)[179]. The chart below shows the number of bonds listed on the most active markets.



2.4. Although non-government debt may be listed, trading does not necessarily occur on exchanges; rather, estimates based on UK FSA transaction reporting data show that approximately 89% of non government debt trading occurs OTC[180].



3. EQUITY AND DEBT INSTRUMENTS ONLY TRADED ON MTFS

3.1. A number of shares and bonds do not have exchange listings but are still traded on MTFs; at present the MAD does not fully apply to these instruments. Whilst these instruments do not represent a significant volume of total trading, they still represent a gap in regulation. The following table provides an approximation of volumes in these instruments[181].

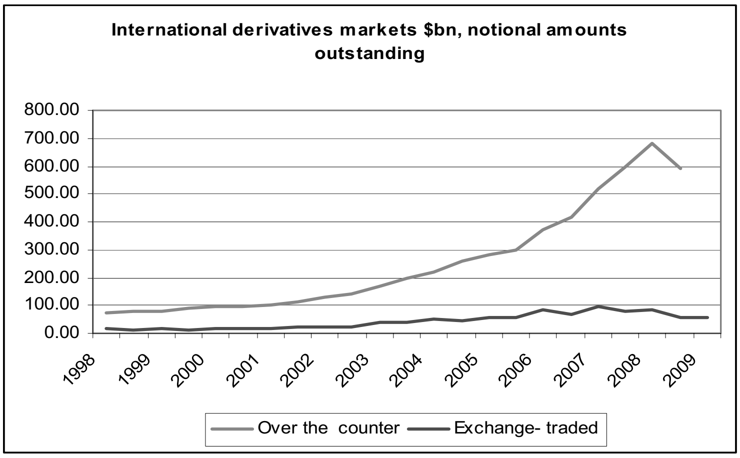
Total MTF trading of instruments not admitted to trading on a regulated market - 2009		
	Total number of trades	Total turnover of trades
Shares	2,964,749	€8.3Billion
Bonds	1,807	€103.4Million

179 PWC estimates based on FESE data, from their report prepared for Commission services.
180 PWC estimates based on data from UK FSA, from their report prepared for Commission services.
181 PWC estimates based on survey of European MTFs, a limited number of MTFs did not provide data, however these were considered statistically insignificant. From their report prepared for Commission services.

4. EU DERIVATIVES MARKETS

4.1. There has been significant growth over a sustained period in the derivatives market, checked by a marked downturn in 2008. Whilst traditional exchange trading has seen some growth, the most significant growth has been in the OTC arena.

4.2. Exchange traded derivatives are generally confined to more standard products such as options and futures, whilst OTC derivatives are not and may include products such as swaps and forward rate agreements. Data on global OTC derivatives markets is mainly generated from statistics compiled by the Bank for International Settlements (BIS). The chart below shows the growth in OTC derivative trading compared with that of exchange trading[182].



4.3. A breakdown by risk instrument of the total OTC derivative market is shown below - over 73% of instruments traded are interest rate products, with foreign exchange and CDS representing 8% and 5% respectively. Equity linked derivatives account for 1.0% ($6trillion) whilst commodity derivatives represent 0.5% ($3trillion) - BIS data as of December 2009[183].

Risk instruments in global OTC markets Notional amounts outstanding						
	2002	2004	2006	2007	2008	2009
$ trillion						
Interest rates	102	191	292	393	419	449
Foreign exchange	18	29	40	56	50	49
Credit default swaps	---	6	29	58	42	33
Equity-linked	2	4	7	8	6	6

182 BIS, International derivatives markets $bn, notional amounts outstanding.
183 BIS, Risk instruments in global OTC markets Notional amounts outstanding.

Commodity	1	1	7	8	4	3
Unallocated	18	27	43	71	71	73
Total contracts	142	259	418	595	592	613

%						
Interest rates	71.8%	73.7%	69.7%	66.0%	70.7%	73.2%
Foreign exchange	13.0%	11.3%	9.6%	9.4%	8.4%	8.0%
Credit default swaps	---	2.5%	6.9%	9.7%	7.1%	5.4%
Equity-linked	1.6%	1.7%	1.8%	1.4%	1.1%	1.0%
Commodity	0.7%	0.6%	1.7%	1.4%	0.7%	0.5%
Unallocated	12.9%	10.3%	10.3%	12.0%	12.0%	11.9%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

4.4. The characteristics of the foreign exchange and interest rate markets (such as high liquidity and their dependence on macro economic factors) mean there is generally less risk of market abuse in theses markets.

4.5. The EU is a key location for OTC trading with the UK, France, and Germany accounting for almost half of the global daily turnover - a breakdown by country is shown below[184].

Location of OTC derivatives turnover by average daily turnover			
	2001	*2004*	*2007*
	% share	*% share*	*% share*
UK	*33,7*	*38,0*	*40,9*
US	*15,3*	*19,3*	*18,6*
France	*5,7*	*6,6*	*5,4*
Japan	*7,1*	*6,0*	*4,4*
Singapore	*3,9*	*3,2*	*4,1*
Switzerland	*3,4*	*2,4*	*4,0*

184 BIS, Triennial Central Bank Survey of Foreign Exchange and Derivatives Market Activity in 2007 http://www.bis.org/statistics/

Germany	*8,5*	*4,1*	*3,2*
Hong Kong SAR	*2,8*	*2,6*	*3,1*
Australia	*2,7*	*2,7*	*3,0*
Others	*16,8*	*15,0*	*13,3*

ANNEX 5 – GLOSSARY OF KEY TERMS

Section A provides a glossary of relevant key terms, whilst Section B provides information on common forms of market abuse. Both sections aim to provide high level information only, and therefore definitions and explanations may differ from those given in technical legislative documents.

SECTION A – KEY TERMINOLOGY RELEVANT TO THE MAD

Broker crossing network	A number of investment firms in the EU operate systems that match client order flow internally (for example Citigroup, Credit Suisse, Deutsche Bank, JP Morgan, Morgan Stanley and UBS). Generally, these firms receive orders electronically, utilise algorithms to determine how they should best be executed (given a client‘s objectives) and then pass the business through an internal system that will attempt to find matches. Normally, algorithms slice larger 'parent' orders into smaller 'child' orders before they are sent for matching. Some systems match only client orders, while others (depending on client instructions/ permissions) also provide matching between client orders and house orders. Broker crossing networks do not show an order book, and as noted above, simply aim to match orders; due this nature they are sometimes compared to Dark Pools, which have similar characteristics.
Central Counterparty (CCP)	A Central Counterparty is an entity that acts as an intermediary between trading counterparties and absorbs some of the settlement risk. In practice, the seller will sell the security to the central counterparty, which will simultaneously sell it on to the buyer (and vice versa). If one of the trading parties defaults, the central counterparty absorbs the loss.
Direct market access (DMA)	Participants require access to a market in order to trade on it. Direct market access refers to the practice of a firm who has access to the market allowing another 3rd party firm electronic access to the market via their own systems.
Lit and Dark orders	A lit order is one which can be seen by other market counterparts. A dark order is one which can not be seen by other market counterparts. Matching dark orders are automatically executed by the trading venue without each counterpart knowing details of the other.
Market Maker	A market maker is a firm that will buy and sell a particular security on a regular and continuous basis by posting or executing orders at a publicly quoted price. They ensure that an investor can always trade the particular security and in doing

	so enhance liquidity in that security.
Multilateral Trading Facility (MTF)	MiFID introduced the concept of Multilateral Trading Facilities (MTFs) to replace Alternative Trading Systems (ATSs) (which had been established prior to MiFID but were not subject to specific European legislation). An MTF is a system, or "venue", which brings together multiple third-party buying and selling interests in financial instruments in a way that results in a contract, MTFs can be operated by investment firms or market operators and are subject to broadly the same overarching regulatory requirements as regulated markets (e.g. fair and orderly trading) and the same detailed transparency requirements as regulated markets; in this sense they are more like a traditional regulated market than a broker crossing network or a systematic internaliser. There are currently 139 MTFs authorised in Europe[185] offering trading on a diverse range of products. The most prominent MTFs are eqity platforms, such as Chi-X and BATS Europe however there are a large number of smaller specialist MTFs providing trading in specific instruments examples include GFI's Creditmatch, Forexmatch, Marketwatch and Energywatch MTFs.
Over the counter (OTC)	Over the counter, or OTC, refers to bilateral trading of instruments; for example one investment firm selling direct to another. As markets have evolved, the definition has broadened to trading not done on a designated trading venue – for example it may now include bilateral trading of instruments which *are* exchange listed, and trading of instruments done via more organised arrangements (such as systematic internalisers and broker crossing networks).
Primary Market Operations	Primary Market Operations are transactions performed by dealers to provide liquidity to issuers of new securities such as sovereign debt and for the purposes of stabilisation schemes (i.e. share issues intended to stabilise a share price). Stabilisation schemes are defined under the Market Abuse Directive.
Regulated Market (RM)	A regulated market is a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in a way that results in a contract. Examples are traditional stock exchanges such as the Frankfurt and London Stock Exchanges.
Systematic Internalisers	Introduced by MiFID in 2007 Systematic Internalisers (SIs) are institutions large enough to match client orders internally, or

185 CESR MiFID database, http://mifiddatabase.cesr.eu/

(SI)	against their own books (unlike a broker crossing network, which may route orders between a number of institutions). They are defined in MiFID as an investment firm which, "on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF". A firm does not need specific authorisation from its competent authority to carry out systematic internalisation; however similar to MTFs and RMs, they are required to conform to some transparency requirements, such as providing public quotes. Only a few (generally large) firms have set up SIs and currently there are 12 registered.
Trading Venue	A trading venue is an official venue where securities are exchanged; it includes MTFs and regulated markets.

SECTION B – TYPES OF MARKET ABUSE

Market abuse may take many forms, however it may be grouped into the following seven categories[186].

Insider dealing	Insider dealing is when an insider deals, or tries to deal, on the basis of inside information.
Improper disclosure	Improper disclosure is where an insider improperly discloses inside information to another person.
Manipulating transactions	Manipulating transactions is trading, or placing orders to trade, that gives a false or misleading impression of the supply of, or demand for, one or more investments, raising the price of the investment to an abnormal or artificial level.
Misuse of information	Misuse of information is behaviour based on information that is not generally available but would affect an investor's decision about the terms on which to deal.
Manipulating devices	Manipulating devices refers to trading, or placing orders to trade, which employs fictitious devices or any other form of deception or contrivance.
Dissemination	Dissemination refers to giving out information that conveys a false or misleading impression about an investment or the issuer of an investment where the person doing this knows the information to be false or misleading.
Distortion and	Distortion and misleading behaviour refers to behaviour that

186 UK FSA, http://www.fsa.gov.uk/pubs/public/market_abuse.pdf

misleading behaviour	gives a false or misleading impression of either the supply of, or demand for, an investment; or behaviour that otherwise distorts the market in an investment.

The following specific terms are also commonly referred to when describing abusive practices.

Churning	Churning is where a broker conducts excessive trading on a client's account in order to increase their commission.
Pump And Dump	Pump and dump is where persons who already hold a long position in an instrument aim to increase its value by spreading false, misleading or exaggerated information about it. The position is then sold at the higher price and a profit is made.
Short And Distort	Short and distort is the opposite of Pump and Dump and is where a person short-sells an instrument and then spreads negative rumours in an attempt to drive down the instrument's price and realized a profit.
Front Running	Front running is where a broker intentionally trades because of and ahead of a client order. For example a broker who buys 100 Company A shares, before executing a client's order for 100,000 Company A shares (with the large client order possibly increasing the share price).
Interpositioning	Interpositioning is where a broker adds another intermediary in a trade, even if not required. This increases commissions of the intermediary for which the original broker will generally also gain some form of benefit – e.g. through mutual interpositioning or other benefits. The client ultimately loses out by not receiving best execution.
Spoofing or Layering	Spoofing and layering are a form of order book manipulation and involve putting apparent trades on order books to create a misleading impression of the stock price or liquidity. For example an abuser will: • submit multiple orders at different prices on one side of the order book slightly away from the touch; • then submit an order to the other side of the order book (which reflected the true intention to trade); and • following the execution of the latter order, rapidly removing the multiple initial orders from the book. By submitting the false orders the abuser gives the

market a misleading impression which may encourage them to trade with the intended order.

ANNEX 6 – STAKEHOLDERS CONCERNED BY MARKET ABUSE

- Investors are the most concerned by market abuse, as they are the main victims who suffer economic losses or lose confidence as a result of insider trading or market manipulation. Investors may also perpetrate market abuse (knowingly or otherwise);

- Financial intermediaries, who may also suffer economic loss as a result of market abuse and who have to report to regulators suspicious transactions they execute on behalf of their clients. Intermediaries may also perpetrate market abuse (knowingly or otherwise);

- Trading venues, including regulated markets, MTFs and other types of trading facilities, who have to have in place surveillance tools to monitor their markets for possible insider dealing or market manipulation;

- Issuers, whether companies or governments, who may see the prices of their shares/bonds affected by market abuse, who have to comply with obligations to disclose inside information and draw up insider lists and ensure that their staff are informed of and comply with rules on insider dealing; Persons discharging managerial functions within an issuer and closely associated persons must notify the competent authority of transactions conducted in shares of the issuer.

- Small and medium-sized enterprises (SMEs) who are already listed or may be considering seeking a listing in order to raise capital;

- Regulators whose responsibility it is to detect, investigate and sanction cases of market abuse in cooperation with other stakeholders.

- All natural and legal persons that might find themselves subject to investigations, measures and sanctions for market abuse practices.

ANNEX 7 – PROBLEM DEFINITION – BACKGROUND AND TECHNICAL DETAIL

7.1 Problem 1: Gaps in regulation of new markets, platforms and OTC instruments

7.1.1. The growth of MTFs not fully covered by the MAD

The MAD is based on the concept of prohibiting insider dealing or market manipulation in financial instruments which are admitted to trading on a regulated market[187]. At the time when the MAD was adopted, regulated markets were used as a proxy for the most liquid and mature markets. Instruments traded on these markets were considered to be sufficiently standardised, to be the subject of enough public information and to have a broad range of investors (including retail investors), to warrant the protections in MAD being applied to them. However, this focus on instruments traded on regulated markets has been overtaken by market developments.

In recent years (especially since the adoption of MiFID), multilateral trading facilities (MTFs) have provided more competition to existing exchanges, gaining an increased share of liquidity and attracting a broader range of investors. If an instrument is admitted to trading on a regulated market then any trading in that instrument is covered by the MAD, whether the trading of that instrument occurs on a MTF, "crossing system"[188] or over-the-counter (OTC). Further, for insider dealing (although not for market manipulation), the prohibition extends also to financial instruments not admitted to trading on a regulated market, but whose value depends on such a financial instrument.

While many of the larger MTFs only trade the most liquid EU shares which are admitted to trading on a regulated market (and therefore are covered by the MAD), 25 of the 41 MTFs in Europe admit to trading financial instruments which are not admitted to trading on a regulated market[189]. Trading in these instruments therefore falls outside the scope of the MAD, and although some Member States have extended the MAD to such financial instruments only traded on MTFs in whole or in part at national level, 8 Member States have not done so[190]. Examples of such instruments, that are only traded on a MTF, include SME shares, corporate bonds and specialist derivative instruments.

In addition, some regulators and stock exchanges have expressed concern that the increasing fragmentation of trading across different venues may make it more difficult for a single trading venue or a single regulator to monitor for possible market abuse. For example, if a financial instrument is admitted to trading on a number of different trading venues and a user engages in abusive behaviour across

187 Article 9 para. 1 of directive 2003/6/EC.

188 A crossing system is an alternative trading system that matches buy and sell orders electronically for execution without first routing the order to an exchange or other organised market which displays a public quote.

189 Source: Unpublished PWC report commissioned by DG MARKT, *Data gathering and analysis in the context of the MiFID review,* p. 315

190 BG, CY, CZ, EE, IE, LV, RO, SI. Source: CESR Review Panel report, *MAD: Options, Discretions and Gold Plating*, November 2009, Ref CESR/09-1120.

those venues, they argue this could make it more difficult for an individual trading venue or a single regulator to detect such behaviour. [191]

In addition, stock exchanges have argued that there may be a lack of a level playing field between trading venues regarding surveillance requirements because MTFs may either not be covered by the MAD or may be subject to different obligations or standards for the monitoring of possible market abuse[192].[193]

Issues regarding improved cooperation and monitoring for market abuse across different trading venues and further aligning surveillance requirements for regulated markets and MTFs will be addressed in the MiFID Review. The Commission will seek stakeholders views on specific options to address these issues.

7.1.2. New organised trading functionalities not fully covered by the MAD

With an increase in the use of technology there has been an emergence of new organised trading functionalities that differ from the established trading venues (regulated markets and MTFs). Examples of such functionalities include broker crossing systems (where systems are used to cross client orders in more liquid financial instruments), swap execution facilities and other inter-dealer broker systems bringing together third-party interests and orders by way of voice and/or hybrid voice/electronic execution systems.

Some of these systems such as broker crossing systems relate to more liquid shares and financial instruments which are already admitted to trading on a regulated market.[194] In such a case, trading on the systems will automatically be covered by the MAD. But in cases where these systems trade other financial instruments that are only traded on these systems and not on a regulated market (or an MTF), the MAD will not apply to them. Some of these instruments may be extremely liquid and standardised (for example credit default swaps or sovereign debt).

This raises the issue of whether certain instruments traded only on these organised trading functionalities should be subject to the same protections against insider trading and market manipulation ensured for regulated markets by the application of MAD, especially as those instruments become more standardised and there is a broader participation by investors in the trading of the instruments. This trend is likely to become more prominent in the future as other EU legislative initiatives will

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191 See intervention by Fabrice Peresse of NYSE Euronext, summary of discussions of panel 2 at 2 July 2010 public hearing in annex 3 .

192 Source: Federation of European Stock Exchanges (FESE), *Response to the Commission's call for evidence – Review of the Market Abuse Directive*, p 2.

193 The requirements for MTFs and regulated markets to monitor for disorderly conduct or conduct that may involve market abuse can be found in Articles 26 and 43 respectively of MiFID. Market operators of regulated markets are also subject to the requirement in Article 6.6 of MAD to adopt structural provisions aimed at preventing and detecting market manipulation practices.

194 Typically such systems use algorithms to slice larger parent orders into smaller 'child' orders before they are sent for matching. Some systems will try to match only client orders while others also provide matching between client orders and house orders (with the permission of clients). If client orders are not matched internally they are then routed on to a trading venue for execution. Data collected by CESR indicates that the use of such systems is still relatively insignificant in terms of the overall percentage of trading but continues to grow.

require more standardised and liquid OTC instruments to be traded on organised trading facilities such as swap execution facilities.

7.1.3. Use of related financial instruments for market manipulation

In addition to the growth of MTFs and other organised trading facilities, the focus of the MAD on instruments traded on regulated markets has been overtaken by market developments in a second respect. Regulators have noted that manipulation of some instruments may involve conduct that takes place using financial instruments traded outside the relevant market but which has an effect on trading of the financial instrument on the market. The conduct may occur using a related instrument traded OTC or a related instrument traded on a different market (e.g. a derivative instrument traded on one market to manipulate an underlying financial instrument on another market).[195] The potential impact of such cross-market manipulation is illustrated by the recent Amaranth case as described by the Commission services in the impact assessment for the proposal for a regulation on energy market integrity and transparency.[196]

Currently the MAD does not explicitly prohibit market manipulation by the use of financial instruments not admitted to trading on a regulated market, but that can have an impact on such a market. Regulators have expressed concern that trading of instruments OTC (such as CDS) or on other markets could be used to manipulate the value of the related instruments traded on regulated markets – and such market manipulation is not clearly prohibited by the MAD[197]. This means that there are potential risks to investor protection and market integrity which may not be fully addressed by the current Directive. Although in practice some Member States (e.g. the UK) have interpreted and implemented the MAD so that it prohibits the use of other instruments to manipulate a market, CESR has called for this to be clarified in the revision of the MAD[198].

7.1.4. Potential use of high speed, high volume automated trading for market abuse

Another significant trend since the commencement of the MAD is the increasing use of automated trading. Automated trading, also known as algorithmic trading, can be defined as the use of computer programmes to enter trading orders where the computer algorithm decides on aspects of execution of the order such as the timing, quantity and price of the order. This form of trading is used by an increasingly wide range of market users (including for example funds and brokers). A specific type of automated or algorithmic trading is known as high frequency trading (HFT).[199]

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195 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009

196 REF: DG ENER IA.

197 CESR's response to the European Commission's call for evidence on the review of Directive 2003/6/EC (Market Abuse Directive), p.3.

198 Ibid, p3.

199 Although there is debate about how it should be defined, it is perhaps best defined as trading that uses sophisticated technology to try to interpret signals from the market and, in response, executes high volume, automated trading strategies, usually either quasi market making or arbitraging, within very short time horizons[199]. It usually involves execution of trades as principal (rather than for a client) and involves positions being closed out at the end of the day.

A significant risk associated with the advent of automated trading is the threat it potentially can pose to the orderly functioning of markets in certain circumstances[200]. In addition, specific strategies that can potentially be applied by automated trading can also raise questions as regards market abuse and if regulatory changes are needed to address the potential abuse[201]. For scope and application of the Market Abuse Directive this raises two issues that need to be addressed:

whether the definition of market manipulation is adequately designed to capture new trading strategies associated with automated and HFT that may constitute manipulative behaviour; and

whether regulators have sufficient tools available to keep up with technological and market structural developments so that they can effectively and swiftly detect and investigate cases of market manipulation.

In respect of the former, the definition of "market manipulation" in MAD is very broad and capable of applying to abusive behaviour no matter what medium is used for trading. Notably, the definition of market manipulation expressly states that it should be adapted to ensure that new patterns of activity can be included. Some regulators have already published information about specific automated trading practices that constitute manipulation of an order book and therefore are contrary to the MAD[202]. However, there appears to be a case for better and uniformly defining abusive strategies in the area of automated trading across the EU. That way a more consistent approach could be taken by competent authorities to monitoring and enforcing any such abusive behaviour and also legal certainty for market participants could be enhanced.

The latter point regarding the tools available to regulators will be addressed in the MiFID Review. There could be increased transparency to regulators regarding algorithmic and HFT and there may be a need to strengthen organisational requirements risk controls for automated trading. Therefore, in the upcoming consultation paper on the MiFID Review the Commission is going to seek stakeholders views on proposals in this area.

7.2. Problem 2: Gaps in regulation of commodity and commodity derivatives markets

Market abuse may take place across markets. Manipulative schemes can extend across different types of markets, and a person can benefit from inside information in one market by trading on another. This raises special concerns for commodities markets, where market integrity and transparency rules apply to the derivatives markets but not to the underlying markets. It is beyond the scope of financial regulation to govern non-financial markets. This is because each underlying

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200 The so-called "flash crash" of 6 May 2010 is a possible case in point although the specific trigger of events appears not to relate directly to HFT, cf. http://www.sec.gov/news/studies/2010/marketevents-report.pdf.

201 Securities and Exchange Commission, *"Concept Release of Equity Market Structure"*, 14 January 2010, http://www.sec.gov/rules/concept/2010/34-61358.pdf, p. 54

202 Notably, the UK FSA, cf. http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter33.pdf.

commodity market has a different market structure and set of price drivers. The degree to which commodities are interchangeable and portable may also vary greatly, and their production patterns are global.

In contrast, financial instruments are fungible and tied to an issuer in a particular jurisdiction. Strong business secrecy and geopolitical issues may also affect and abruptly alter information flows and there is less systematic disclosure of market relevant information than in the case of financial instruments. Issues specific to each commodity market, as well as issues arising from their interconnectedness with financial markets, will be addressed in the forthcoming Commission Communication on commodity and related derivative markets.

General rules, such as the prohibition against fraud, apply to physical markets, but there are no general provisions that ensure transparency of trading activity and prices, and that govern how traders are required to behave. Such rules may in some cases be set by a market operator, at the market level by a self-regulatory body, at national level, or they may not exist at all. As a result, the level of regulation that applies to the underlying market may be different for each commodity.

Typically, rules governing commodities markets do not require comprehensive disclosure of inside information, nor record keeping of transactions, and manipulative behaviour in such markets is not generally prohibited. Further, underlying commodities markets are extremely diverse. Unlike trading in the financial instruments, trading in the underlying commodities may not be centralised and often may take place outside the EU (either partially or totally).

7.2.1. Lack of transparency in commodities markets trading for market participants and supervisors

Commodities markets are not subject to the same rules on trading activity as financial markets. Regulators have noted that the required information that would enable them to detect market abuse in energy markets is not available and express concern about the potential for such abuses to take place.[203] Under MiFID, only transactions in commodity derivatives that are admitted to trading on a regulated market are reported.[204] Transactions in commodities markets are not reportable, nor are OTC instruments the value of which depends on that of commodities. In particular, there is currently no complete picture of trading in the energy market. However, the Commission has adopted a proposal on Energy Market Integrity and Transparency, which introduces a new energy market regulator. The Commission has also adopted a Regulation on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances[205] which addresses market oversight issues, and the Commission's recent Communication on carbon market oversight[206] provides a preliminary, high-level assessment of the current levels of

203 CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse, October 2008, page 3

204 Article 25(3) of Directive 2004/39/EC and Articles 10 to 14 of Regulation 1287/2006

205 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:302:0001:0041:EN:PDF

206 COM (2010) 796 final, 21.12.2010.

protection of this market from market misconduct. Currently, there are no similar proposals to cover other commodities markets.

7.2.2. Lack of cooperation between supervisors of physical and financial commodity markets

In addition to the concern over market integrity and transparency rules, there is also the issue of market structure. Commodity derivatives markets are integrally linked with commodity markets through the actions of traders located around the world. For instance, many commodity trading firms are based in Switzerland, where they generate one third of world trade in crude oil even in the absence of a liquid spot market or centralised futures exchange.[207] These commodity traders act as intermediaries, selling commodities on a forward basis, and hedging themselves in both the commodity and derivatives markets. They will therefore also be the counterparty to many derivatives trades. Both markets therefore need to be monitored in as comprehensive a way as possible for abuses .

Commodity markets share the common feature of being global, but apart from that the structure of the market is different for each commodity. While some commodities are to a large extent traded on central platforms, such as the CME in Chicago and the LME in London, others may work on a purely bilateral basis. Trading may be relatively transparent in one market, but prices and trades may be entirely opaque in another. The detection of market abuse may be more difficult for commodities due to the global nature of these markets. When manipulative strategies extend across both the commodity and the commodity derivatives market, detection and prosecution would require cooperation between authorities overseeing these markets.

Financial regulators have signalled the need to take a greater interest in the physical commodity markets and to cooperate more closely and share information[208]. However, currently there is no obligation in the MAD for financial regulators to take into account developments on physical commodity markets when monitoring financial markets for possible market abuse, or to cooperate and exchange information with regulators of physical markets. Since it is possible for transactions on physical markets to be used to manipulate the prices of instruments on financial markets and vice-versa, as explained above, this lack of cooperation between physical and financial market regulators could undermine the integrity of both physical and financial markets.[209]

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207 http://www.gtsa.ch/geneva-global-trading-hub/key-figures

208 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009

209 The Commission has adopted a proposal on Energy Market Integrity and Transparency, which introduces a new energy market regulator, and a proposal on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances establishing a scheme for greenhouse gas emission allowances trading. These proposals do not cover other commodities markets.

7.2.3. *Lack of information that affects commodity prices*

The definition of inside information applicable to derivatives on commodities[210] lays down a specific standard, which differs from the general definition of inside information applicable to all other financial instruments.[211] Essentially, for commodity derivative markets the determination of what should be regarded as inside information is largely determined by the transparency standards prevalent in both the spot and the derivative market of the relevant commodity.[212] Experts have noted that the definition of inside information for commodity derivatives is not precise enough in certain key commodity markets, which creates legal uncertainty for market participants.[213]

In recent years, several studies have drawn attention to a lack of transparency of fundamental commodity market information.[214] Despite a certain amount of information being published - on generation, transmission, transportation, storage, capacity levels, etc - transparency of fundamental data has to be improved. In particular, rules and practices are not precise enough and/or not legally binding, and are different from one commodity market to the next. The level of regulation may be different for each market as well.

The lack of a legally binding definition of what is considered to be inside information in commodity derivatives markets means that investors on commodity derivatives markets are less protected from information asymmetry in the underlying market than investors in derivatives of financial markets. Energy market regulators cite concern among market participants that there are information asymmetries linked to a poor level of transparency which may lead to market abuse.[215]

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210 Article 1.1 § 2 of Directive 2003/6/EC and implemented in Article 4 of implementing Directive 2004/72/EC.

211 Article 1.1 § 1 of Directive 2003/6/EC

212 This standard refers to information which: (i) one would expect to receive routinely as a user of the relevant markets; and (ii) would be disclosed in accordance with legal or regulatory provisions, market rules or other accepted market practice on the relevant underlying commodity or commodity derivative market.

213 ESME Report, Market abuse EU legal framework and its implementation by Member States: a first evaluation, Brussels, July 6th, 2007, page 17.

214 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009, page 11

The Need for Transparency in Commodity and Commodity Derivatives Markets, Piero Cinquegrana, European Capital Markets Institute (ECMI) (2008)

IMF, *Word Economic Outlook,* October 2008

215 CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse, October 2008, page 3. The Commission has adopted a proposal on Energy Market Integrity and Transparency, which contains a definition of inside information based on the definition used in MAD and applies it to wholesale energy markets. It has also adopted a proposal on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances establishing a scheme for greenhouse gas emission allowances trading, which lays down requirements for ensuring market transparency, integrity and investor protection. These proposals do not cover other commodities markets.

7.2.4. *Uncertainty on who is responsible for disclosing inside information in relation to commodity derivatives*

Article 6 of the level 1 directive suggests that, like all issuers of other financial instruments admitted to trading on regulated markets, issuers of commodity derivatives admitted to trading on regulated markets are required to publicly disclose inside information. However, the "issuer" of a commodity derivative is usually the market operator or some other specific participant, who will only possess a small part of the information covered by the transparency standards prevalent in both the spot and the derivative market of the relevant commodity. While the market operator or other participant who issued the instrument may have valuable information with regards to trading activity, he will not be privy to unpublished fundamental data of the underlying market (generation, transmission etc...). So in this respect the issuer of a commodity derivative is in quite a different position to an issuer of other types of securities such as shares or debt. This point has been recognized by many stakeholders, notably CESR/ERGEG in the energy field[216]. Regulators have noted that it will typically be market participants in the product markets who possess such information, but it may not be appropriate to consider them to be issuers.[217]

As a result, there is no general legal obligation which ensures the disclosure of price sensitive information in the commodities markets. This means that such information may not be published, or only published in a fragmented way.

Respondents[218] to the public consultation have raised the point that commodity markets vary according to the type of commodity and were of the opinion that tailor-made, sector specific transparency regimes that would enhance transparency in the spot markets would be a good solution. They have argued that a legal framework for transparency on fundamental data in the commodity spot markets should also allow for a better application of the MAD definition of inside information for commodity derivatives.[219]

7.2.5. *Concern that speculation in derivatives markets affects commodity prices*

Concerns have been raised that investment in certain derivative markets (e.g. commodity derivatives linked to the 2008 food and oil crisis), initially intended for risk management purposes, has grown beyond desirable levels and contributed to dislocations in the underlying market.

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216 http://www.cesr-eu.org/index.php?page=document_details&from_title=Documents&id=5270

217 European Commission Consultation Paper on a Revision of the MAD, Contribution des autorités françaises

218 For example FOA, AIMA, AFG and ICAP.

219 Level 2 implementing measure, namely of Article 4 of the Directive 2004/72/EC. The Commission has published a proposal on Energy Market Integrity and Transparency, which will require all market participants in wholesale energy markets to disclose inside information. It has also published a proposal on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances establishing a scheme for greenhouse gas emission allowances trading which lays down uniform requirements ensuring market transparency, integrity and investor protection. These proposals do not cover other commodities markets.

For instance, the price rises in respect of certain staples may be attributed to a substantial extent to speculation by different actors in the food commodity markets,[220] high food prices are partly driven by speculation from new financial players, mainly short run,[221] and index traders may increase futures prices, impede price convergence and contribute to fluctuations.[222]

Speculation, however, is a necessary feature of any liquid and efficient market. Drawing a line between speculative and hedging activities is notoriously difficult, as is establishing correlations between its role in derivatives trading and effects in the underlying market. It is also crucial to remember that speculation is not market manipulation. The latter consists in distorting or trying to distort the price of a financial instrument, while speculation is taking a risk in the market in order to benefit from future price changes.

Other studies have found that commodities futures signal the expectations about the future directions of the spot prices rather than determining these prices,[223] and produce findings consistent with the hypothesis that speculators play a role in providing liquidity to the markets and may benefit from price movements, but do not have a systematic causal influence on prices.[224]

When speculation uses abusive methods to manipulate prices on a market it constitutes market manipulation and is covered by MAD. Therefore the issue of speculation will be considered by the Commission in other initiatives. In particular, traders may take large positions which could harm market stability. This issue will be addressed in the review of the Markets in Financial Instruments Directive (2004/39/EC), which considers the option of giving regulators the power to set limits on derivative positions market participants can hold under certain conditions.

7.2.6. No prohibition against market manipulation in commodities markets

Market manipulation in commodities markets is currently not prohibited. While MAD prohibits market manipulation in commodity derivatives markets, manipulation of the underlying markets is currently not prohibited. Also, manipulating derivatives markets through commodities markets is not adequately covered under the current directive.

Regulators have expressed concern that the scope of MAD may not properly address market integrity issues in energy markets, as physical products are not covered.[225]

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220 UNCTAD, Addressing the global food crisis. Key trade, investment and commodity policies in ensuring sustainable food security and alleviating poverty, 2008

221 Timmer, C. Peter. *Causes of High Food Prices*. Asian Development Bank Working Paper Series No. 128, October 2008

222 U.S. permanent sub-committee on investigations, "excessive speculation in the wheat market," June 2009

223 Commission Staff Working Document – Task force on the role of speculation in agricultural commodities price movements, SEC (2008) 2971

224 IMF, Global Economic Outlook, September 2006.

225 CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse, October 2008, page 15

This is due to the fact that manipulative strategies may involve market conduct in several related markets.[226]

7.2.7. Commodity derivatives may be used to manipulate commodity prices

Regulators have noted that manipulative schemes in commodities markets may involve conduct that takes place on commodity futures, OTC derivatives and physical commodity markets.[227] The potential impact of such cross-market schemes is illustrated by the recent Amaranth case for energy markets.[228] Public authorities have also signalled that the European legal framework is not suited to address manipulative strategies that extend across physical and derivatives markets.[229]

For instance, a manipulative strategy may involve taking a large derivatives position; stockpiling the underlying commodity, and then requiring the counterparties on the derivatives deals to settle the derivatives contracts by physical delivery of the underlying.

Of notable concern are cases where derivatives are used to manipulate the underlying commodities market. Derivatives contribute to price formation in the underlying and as such can impact its price. Distorted commodity prices will affect end users in the real economy. The MAD framework does not fully capture this type of abuse, as the current definition of market manipulation is limited to transactions or orders to trade which distort the prices of financial instruments to an artificial level. Transactions in derivatives which distort the prices of other financial instruments are illegal, while transactions in derivatives which distort the prices of physical markets are not covered under the current definition of market manipulation. This means that market manipulation of prices on physical commodities markets by the use of commodity derivatives is not currently prohibited by the MAD.

7.3. Problem 3: Regulators cannot effectively enforce

Part 1: Regulators lack certain information or powers

7.3.1. Insufficient information available to regulators to monitor market integrity

Article 6(9) of the MAD requires persons professionally arranging transactions in financial instruments to report suspicious transactions to the competent authority without delay. This measure aims to improve transparency and is a primary source of information to ensure that market abuse can be detected by competent authorities.

226 The Commission has adopted a proposal on Energy Market Integrity and Transparency, which will establish rules prohibiting manipulative practices on wholesale energy markets. It has also adopted a proposal on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances establishing a scheme for greenhouse gas emission allowances trading which lays down uniform requirements ensuring market transparency, integrity and investor protection. These proposals do not cover other commodities markets.

227 Task Force on Commodity Futures Markets, Final Report, Technical Committee of the International Organization of Securities Commissions, March 2009, page 15

228 Proposal for a regulation on Energy Market Integrity and Transparency, Impact Assessment, SEC(20101510), 08/12/2010

229 European Commission Consultation Paper on a Revision of the MAD, Contribution des autorités françaises

However, as explained above in section 7.1.1.1, 7.1.1.2 and 7.1.1.3, due to market developments, some increasingly important markets and instruments have remained outside the scope of the MAD. Consequently these markets and instruments remain in-transparent and outside the supervisory oversights of competent authorities. As a result market abuse remains undetected.

The reporting of OTC transactions on instruments not admitted to trading on a regulated market to the competent authorities is not currently mandatory, and such reporting would make it easier for regulators to address any issues of market integrity which might emerge[230]. This issue falls outside the scope of the MAD review but will be addressed in the MiFID review, since that is where transaction reporting requirements are provided for. Options under consideration in the context of the MiFID review relating to the widening of the current scope of reporting concern (i) transactions on instruments only traded on MTFs; and (ii) transaction or position reporting on OTC derivatives.

An additional problem is that while Article 6(9) of the MAD requires persons professionally arranging transactions in financial instruments to report suspicious transactions to the competent authority without delay, this obligation does not extend to suspicious orders or to suspicious OTC transactions, including in derivatives. However, orders can be used for market manipulation without being executed (for example by placing a large number of orders to give a misleading signal of demand for an instrument, which affects the price of the instrument while the orders are withdrawn). In addition, CESR has called on the Commission to make the reporting of suspicious transaction reports on OTC derivatives mandatory as regulators are concerned about the potential for OTC derivatives to be used for insider dealing and market manipulation[231].

7.3.2. *Insufficient investigation powers of competent authorities*

a) access to telephone and existing data traffic records

Article 12 of the MAD stipulates that competent authorities must have the right to *"require existing telephone and existing data traffic records"*. In accordance with article 12(1) of the MAD, this powers can be exercised (a) directly; or (b) in collaboration with other authorities or with the market; or (c) under its responsibility by delegation to such authorities or to the market undertakings; or (d) by application to the competent judicial authorities. In practice, two types of data constitute important evidence to detect and prove the existence of market abuse such as market manipulation and insider dealing: data records from investment firms executing transactions and telephone data records from telecom operators.

230 Article 25(3) of Directive 2004/39/EC (MiFID) and Articles 10 to 14 of Regulation 1287/2006/EC implementing MiFID establish the current requirements for transaction reporting. This applies to any financial instrument admitted to trading on a regulated market whether or not the transactions were carried out on a regulated market. Member States have the option, pursuant to Recital 45 of Directive 2994/39/EC, to require reports on transactions also in financial instruments that are not admitted to trading on a regulated market, such as various OTC derivatives. A number of Member States (e.g. UK, ES, AT) have exercised this option, and others have committed to following suit (CESR/09-1036).

231 CESR's response to the European Commission's call for evidence on the review of Directive 2003/6/EC (Market Abuse Directive), p. 6.

First of all, Member States can require access to telephone and data traffic records relating to trading kept by investment firms (e.g. to provide evidence of the conclusion of a contract) to ensure that competent authorities are able to investigate and detect suspected market abuse. Second, in more specific cases, for example to establish whether inside information has been transferred from a primary insider to someone trading with this inside information, access to telephone data records held by telecom operators can be very important evidence. For example, this data would represent important can be sometimes the sole evidence in a case where a board member of an company in possession of inside information may have transferred inside information by phone to a friend, relative or family member who afterwards executes a suspicious transaction based on the inside information received. The telephone traffic records from telecom operators could can be used by the regulator to demonstrate that a call had been placed by the primary insider to their friend or relative shortly before that person then called their broker to instruct them to make a suspicious transaction. The traffic records from telecom operators would provide evidence of a link which could be used as evidence to sanction the case.

Therefore, access to this data from telecom operators is considered among the most important issues for the accomplishment of the investigatory and enforcement tasks of CESR members.[232] Access to the data held by telecom operators by the competent authorities is covered by article 15 of Directive 2002/58/EC[233] (e-Privacy Directive) which restricts access to these records to cases where it is "*a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46*/EC." Some Member States[234] have reported that this provision has made it impossible for them to obtain access to existing telephone data records from telecom operators to provide evidence for the investigation and sanctioning of market abuse when the authority does not have the possibility to pursue criminal cases. As a result, specific market abuses subject to administrative measures and/or administrative sanctions may remain undetected and unsanctioned regardless of the powers provided by article 12 of the MAD.

It should be noted that any policy measures with regard to access to telephone data records from telecom operators should be assessed on their necessity and proportionality, in compliance with article 8 of the EU charter of fundamental rights and article 16 of the TFEU.

b) Power to ask permission from a court to enter private premises and seize documents

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232 CESR answer to the call for evidence on the review of the MAD, of 20 April 2009, available at http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm.

233 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on processing of personal data and the protection of privacy in the electronic communications sector.

234 CY, ES, FI, LV, NL, CESR report, p.98, Ref. CESR/09-1120, available at www.cesr-eu.org; CESR answer to the call of evidence on the review of the MAD, of 20 April 2009.

For the purpose of detecting market abuse, it is important for competent authorities to have the possibility to be granted access to private premises and seize documents. This is particularly necessary where: (i) the person to whom a demand for information has already been made fails (wholly or in part) to comply with it; or; (ii) where there are reasonable grounds for believing that if a demand were to be made, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.

While currently all jurisdictions provide for access to any document, not all competent authorities have the power to enter private premises and seize documents avoiding the risks described above. As a result, the risk exists that competent authorities in such cases are deprived from important and necessary evidence, and accordingly, market abuse remains undetected and unsanctioned.

In this context, is important to point out that such an access constitutes an interference with the fundamental right to private and family life, recognised by Article 7 of the EU Charter and could constitute a limitation to the freedom to conduct a business. Therefore, attention should be paid to the decision of the EUCHR of 21.12.2010 (Primagaz v. France (no. 29613/08), Société Canal Plus and Others v. France (no. 29408/08) concerning the searches of their premises by competition authorities, in which the applicants were suspected of anti-competitive practices, and where various documents and data media were seized. The Court has found that the conditions applicable to this search were in breach of articles 6, of the European Convention of HR namely because there was no effective judicial review of the lawfulness and well-foundedness of the search and seizure orders. The national legal measures must also provide for appropriate redress in case of unlawful search and seizure.

7.3.3. Attempts at market manipulation not prohibited

Another gap in the Directive is that currently it does not cover 'attempts' at market manipulation[235], so proving a market manipulation requires a regulator to demonstrate the either an order was placed or a transaction was executed and that it had the effect of manipulating the market, and this is not always possible. For example, there may be situations where a person takes steps and there is clear evidence of an intention to manipulate the market but for some reason either an order is not placed, or a transaction is not executed, or it is not possible to prove that the action had the intended effect. Providing for an offence of 'attempted market manipulation' would provide regulators with a tool to sanction attempts at market manipulation which do not succeed, or cases where it is difficult to prove the effect of the attempt but there is clear evidence of an intention to manipulate the market. The United States has a provision prohibiting attempted market manipulation in its legislation and has prosecuted cases on this basis[236].

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235 Article 6 para. 9 of Directive 2003/6/EC.

236 See intervention by Stephen Obie, Commodities and Futures Trading Commission (CFTC), summary of the MAD hearing of 17 July 2010 in annex 3.

7.3.4. Absence of protections and incentives for whistle blowers

When investigating market abuse, competent authorities have many investigatory tools at their disposal; however a useful source of primary information is the financial industry itself, which may alert competent authorities to cases of suspected market abuse. Such alerts, which may come from a diverse range of participants, are sometimes referred to as "whistle blowing"[237]. However, provisions for whistle blowing within Europe differ significantly and there are key areas where current provisions are considered insufficient; specifically - the protection available to whistle blowers, the lack of appropriate processes in place by competent authorities for the reporting of whistle blowing and the lack of incentives for persons to "blow the whistle".

Insufficient protection for whistle blowers

Currently, the protection available to whistle blowers within the EU is generally limited to national horizontal employment laws and in some cases does not exist at all[238]. Without sufficient protection, market participants who may be aware of market abuse may not feel confident to report their suspicions for fear of reprisals (for example losing their job, not gaining promotion or other discrimination by their employer). As a consequence of this, there is a significant chance that these cases are not investigated.

Lack of appropriate processes in place by competent authorities

At present member states have no specific provisions in place for whistle blowing for the purpose of market abuse to alert competent authorities to potential cases of market abuse and have issued little guidance on the subject[239]. Whilst firms generally have their own internal procedures, competent authorities play a vital, independent, 3rd party role for whistle blowers who cannot raise an issue internally or who have tried to raise an issue internally without success. As a consequence, whistle blowers may be discouraged from contacting competent authorities and so potential cases of market abuse may go unreported.

It is also important that competent authorities take appropriate steps to examine the information provided by whistle blowers. Whilst there have been no examples in Europe of competent authorities failing to review information appropriately, there is some evidence in the US. Most notable is the fraudulent hedge fund run by Bernard Madoff for which, between 1992 and 2008, the SEC received six substantial complaints all of which were dismissed[240]. Therefore there is the potential problem,

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237 Alerting authorities to possible issues, or "Whistle Blowing", is not limited to the financial sector. Indeed, it is an established tool which has benefited many industries and sectors – for example abnormalities in a firm's accounting, malpractice within a government department, potential issues affecting persons health and safety and environmental issues.

238 Feedback received from CESR-Pol members, December 2010.

239 Whilst some member states already have provisions in place (e.g. UK FSA has a public email address, telephone number and guidance on its website), the majority do not.

240 SEC - Office of Inspector General, Investigation of Failure of the SEC To Uncover Bernard Madoff's Ponzi Scheme, Case No. OIG-509, August 2009

as seen in the US, that competent authorities may not have the appropriate internal processes in place to adequately review information sourced from whistle blowers.

Insufficient incentives for whistle blowers

In addition to the above two points, some participants with potentially valuable information to regulators do not always have a regulatory obligation to report this (for example workers in a prospectus printing firm), whilst other participants may stand to lose personally if they do report their suspicions (for example they may find it hard to find employment after being named as a "whistle blower"). Such persons may therefore lack the incentive to report suspected market abuse to the authorities. As a consequence there is a high possibility that cases of market abuse which may have been brought to the attention of the competent authority actually remain undetected. It is in order to provide an incentive for such persons that the US is currently finalising specific provisions for financially rewarding whistle blowers who report fraudulent or corrupt trading activity – with those who provide such information potentially sharing between 10-30% of any fine over $1million levied by the CFTC or SEC[241].

Whistle blowing has proved to be a useful tool across many sectors - according to a recent survey analysing 360 cases across Europe, Middle East and Africa, 25% of occurrences of fraud came to light as a result of whistle blowing – more than any other actor including regulators, auditors and the media[242]. In the case of market abuse, whistle blowing can also be a powerful tool, not only providing evidence in specific cases but also helping regulators to enhance their market intelligence and maintain an overview of suspected abuses/abusers. In the UK, for example, approximately 30% of investigations are originated via a member of the public or an anonymous person contacting its telephone helpline or email inbox (excluding those originated by suspicious transaction reports or stock exchange notifications)[243].

It should be noted that whistle blowing raises issues regarding the protection of personal data (Art 8 of the EU Charter and Art. 16 of the TFEU) and the presumption of innocence and right of defence (Art. 48) of the EU Charter. Therefore, any implementation of whistle blowing schemes should comply and integrate data protection principles and criteria indicated by EU data protection authorities[244] and ensure safeguards in compliance with the Charter of fundamental rights.

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241 The Financial Regulation Bill (also known as the Dodd-Frank Act) includes the provision for a reward programme to compensate whistleblowers who report fraudulent or corrupt trading activity to the CFTC or SEC. Passed in July 2010, but with the detailed rules still to be fully implemented, a new fund would pay out between a minimum 10% and a maximum 30% of the recovered funds from a violation of more than $1 million.

242 Alternative to Silence, Whistle blowing protection in 10 European Countries; Transparency International, 2010. Source – KPMG Forensic, profile of Fraudster, Survey 2007

243 Figures provided by UK FSA for period 01 December 2009 – 30 November 2010. This figure excludes the cases which are originated by Suspicious Transaction Reports or Notifications by Exchanges, including these, approximately 6% of all cases are originated by members of the public or anonymous persons.

244 Article 29 Working Party in its Opinion 1/2006 on the application of EU data protection rules to internal whistle blowing schemes in the fields of accounting, internal accounting controls, auditing

Part 2: Sanctions for market abuse are lacking or not dissuasive

The report by the High-Level Group on Financial Supervision in the EU[245] recommended that "sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes". To this end, the group considers supervisory authorities must be equipped with sufficient powers to act and should be able to rely on "equal, strong and deterrent sanctions regimes against all financial crimes sanctions which should be enforced effectively".

Effective enforcements require that, in accordance with article 14 of Directive 2003/6/EC, measures are "effective, proportionate and dissuasive". This implies that sanctions should be available to competent authorities and sufficiently dissuasive. In addition, effective enforcement also relates to the resources of competent authorities, their powers and their willingness to detect and investigate abuses.

However, the High-Level Group considers that "none of these is currently in place" and Member States sanctioning regimes are regarded as in general weak and heterogeneous. To this end, the Commission has published a Communication[246] with regard to sanction regimes in the financial sector.

7.3.5. *Not all Member States have all types of sanctions at their disposal to exercise their powers to sanction*

A first precondition for of an effective sanctioning regime is the availability of a wide range of sanctions to the competent authorities. This is necessary to ensure that competent authorities have sufficient tools available to respond with the appropriate sanction corresponding to the severity of the market abuse observed. Only when competent authorities have a wide range of sanctioning powers are they in a position to ensure that sanctions are optimal in terms of effectiveness, proportionality and dissuasiveness[247]. Evidence shows that not all competent authorities have all types of sanctions available and as a result they do not posses the tools to act appropriately in all circumstances. This is reinforced by the absence of a definition of what is meant by administrative measures and administrative sanctions. For example, 4 Member States do not have administrative measure available for insider dealing and for market manipulation. In addition, as shown in table 1 respectively 4 and 8 Member States do not have pecuniary administrative sanctions available for insider dealing and market manipulation. Further, in 8 Member States, competent authorities do not have the possibility to withdraw the authorisation in case of violations. As a result, in cases where it would be appropriate and proportionate to withdraw authorisation, competent authorities would not be allowed to do so. In addition, 18 Member States

matters, fight against bribery, banking and financial crime available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf

245 *Report of the High-Level Group on Financial Supervision in the EU*, Brussels, 25.2.2009, p. 23.

246 European Commission, Communication on *Reinforcing sanctioning regimes in the financial sector*, COM (2010) 716, 8 December 2010.

247 European Commission, Communication on *Reinforcing sanctioning regimes in the financial sector*, COM (2010) 716, 8 December 2010, p 4-6

do not provide for the disqualification/dismissal of the management and/or supervisory body in cases involving market manipulation[248].

Table 1: overview of availability of administrative sanctions[249]

Administrative sanctions	Insider dealing	Market manipulation
MS without administrative measures	4	4
MS without administrative pecuniary sanctions	8	4

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

7.3.6. *Insufficient level of administrative measures and sanctions (Article 14 of Directive 2003/6/EC)*

The High Level group on Financial Supervision underlined that "sanctions for insider trading range from a few thousands of euros in one Member State to millions of euros or jail in another"[250], which could lead to regulatory arbitrage in a single market.

First of all, the level of administrative pecuniary sanctions varies widely among Member States and in some cases the maximum fine can be considered low and insufficiently dissuasive. When the gains of a market abuse offence are higher than the expected sanctions, the deterrent effect of the sanctions is undermined[251]. This is reinforced by the fact that the offender might consider that his offence could remain undetected. Therefore, to ensure that fines are sufficiently dissuasive, it is important that the possibility for an infringement to go undetected is offset by the possibility to impose fines which are higher than the benefit gained from the offence[252]. As shown in table 2, respectively 4 and 9 Member States have sanctions lower or equal to EUR 200.000 while respectively 10 and 14 Member States have sanctions of more then EUR 1 Million for the same offences. These sanctions can be considered weak as insider dealing and market manipulation offences covered by Directive 2003/6/EC

248 CESR, report on administrative measures and sanctions as well as criminal sanctions available in Member States under the Market Abuse Directive (MAD), ref CESR/07-693, available at www.cesr-eu.org

249 Executive summary to the CESR report on administrative measures and sanctions as well as criminal sanctions available in Member States under the Market Abuse Directive (MAD), p 2, ref CESR/08-099 available at www.cesr-eu.org

250 *Report of the High-Level Group on Financial Supervision in the EU*, Brussels, 25.2.2009, p. 23

251 Wouter Wils, Optimal Antitrust fines – theory and practice, World Competition 2006, p. 190; FSA Market Watch newsletter, Our strategy and key objectives for tackling market abuse, issue 26, April 2008, p.7, available at: www.fsa.gov.uk

252 Wouter Wils, Optimal Antitrust fines – theory and practice, World Competition 2006, p. 190; FSA Market Watch newsletter, Our strategy and key objectives for tackling market abuse, issue 26, April 2008, p.7, available at: www.fsa.gov.uk

can lead to gains of several million euros, in excess of the maximum levels of fines provided for in some Member States.[253]

Table 2 Level of sanctions for insider dealing and Market Manipulation among Member States.

		Insider dealing	Market manipulation
Member States with maximum administrative sanctions	≤ 200. 000	4	9
	> 1 Million	10	14
Member States with administrative sanctions linked to the benefit		9	11
No administrative pecuniary sanctions		8	4

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

Second, the criteria to determine the level of sanctions[254] vary widely among Member States. As demonstrated in table 2, respectively 10 and 11 Member States take into account the benefit obtained through the offence when defining the maximum sanction for insider dealing and market manipulation. As stated above, when a fine is not considerably higher than the benefit that may be gained from a violation, its deterrent effect is flawed.

Third, no clear definition exists on what is meant by administrative measure or sanctions within the EU.

7.3.7. Differences in terms of the nature of the sanctions (administrative versus criminal sanctions)

MAD requires Member States to provide for administrative sanctions and measures. The Directive offers Member States the freedom to provide for criminal sanctions to address market abuse. However, there is a wide divergence in which market abuse offences are defined as criminal by Member States and are therefore subject to criminal sanctions, as shown in table 3 below.

Table 3 – Offences of insider dealing and market manipulation subject to criminal sanctions in Member States

Article of MAD and offence	**Number of EU countries with**	**Countries without criminal**

253 European Commission, Impact assessment on Sanctions in the financial Services Sector, p 12; FSA Market Watch newsletter, Our strategy and key objectives for tackling market abuse, issue 26, April 2008, p.7, available at: www.fsa.gov.uk

254 For example: the profit derived from the offence, the financial capacity of the offender including its own funds, the loss incurred by third parties

	criminal sanctions	sanctions
Article 2 (insider dealing by a primary insider)	26/27	BG (SI has criminal fines not imprisonment)
Article 3a (disclosure of inside information by a primary insider)	22/27	BG; CZ; EE; FI; SI
Article 3b ("tipping" by primary insiders)	25/27	BG;SI
Article 4 (insider dealing by secondary insiders)	23/27	BG; IT; SI; ES
Article 4 (disclosure of inside information by secondary insiders)	19/27	BG; CZ; ET; FI; DE; IT; SI; ES
Article 4 ("tipping" by secondary insiders)	21/27	BG; CZ; DE; IT; SI; ES
Article 5 (market manipulation)	23/27	AT; BG; SK; SI

Source: Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org, and additional information received from Member States in 2010.

The analysis in table 3 shows that none of the offences of insider dealing or market manipulation is subject to criminal sanctions in all EU Member States. For example, for the offence of improper disclosure of inside information by secondary insiders, 8 Member States lack criminal sanctions, while for the offence of "tipping" by secondary insiders, 6 Member States lack criminal sanctions. Since maket abuse can be carried out across borders, this divergence can be expected to have negative effects on the single market and could encourage potential offenders to carry out market abuse in Member States which have the least strict sanctions. It also complicates cross-border cooperation by law enforcement authorities. Further, since criminal sanctions have a greater deterrent effect, potential offenders in Member States lacking criminal sanctions may be less likely to abstain from carrying out market abuse due to fear of criminal prosecution and possible imprisonment.

Concerning the maximum levels of criminal sanctions, 14 countries can impose up to 5 years of imprisonment for insider dealing and 15 countries can do the same for market manipulation. On the other hand, in respectively 11 and 8 countries, maximum criminal sanctions can go beyond 5 years of imprisonment with an absolute maximum of 15 years in 1 Member State.

7.3.8. *Level of application of sanctions differs*

The effectiveness, proportionality and dissuasiveness of sanctioning regimes depend not only on the sanctions provided for by law but also on their application. In order to achieve their objectives, sanctions should be imposed and enforced by competent

authorities when infringements occur. The fact that few abuses are sanctioned has been underlined by some regulators and other stakeholders in their answers to the call for evidence[255]. It can also be deduced, for example by comparing findings such as the FSA "measurement of market cleanliness"[256], which shows, year after year, that a significant proportion of takeovers announcements appear to be preceded by abnormal volume, with the very limited insider dealing sanctions decided each year. While it is acknowledged that publication of sanctions is of high importance to enhance transparency and maintain confidence in financial markets[257], publication of sanctions imposed by competent authorities still diverges widely among Member States[258].

7.4. Problem 4: Lack of clarity and legal certainty

7.4.1. Lack of a single rulebook due to options and discretions

A number of provisions of the MAD include options and discretions for Member States which have resulted in divergent implementation of the Directive[259]. A list of the options and discretions in the MAD is included in annex 11. The possibility for Member States to use these options or discretions to implement specific provisions of the MAD in different ways means that different Member States have different rules. According to the De Larosière report, the single market cannot function properly if national rules and regulations are significantly different, such diversity can cause competitive distortions and encourage regulatory arbitrage and is inefficient for cross-border groups. De Larosière also argues that the main cause of this situation stems from the options provided to Member States in the enforcement of EU directives[260].

In light of the advice of the De Larosière report, the Commission has stressed in its Communication on Driving European Recovery the need to identify and remove key differences in national legislation stemming from exceptions, derogations, additions made at national level or ambiguities in current directives[261]. Some of the provisions which provide for options or discretions have already been addressed in previous sections, and the remaining issues are addressed below.

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255 Call for evidence on the review of Directive 2003/6/EC on insider dealing and market manipulation (Market Abuse Directive), april 2009

256 FSA, Updated Measurement on market cleanliness, p 6-8 March 2007, http://www.fsa.gov.uk/pubs/occpapers/op25.pdf

257 CESR, review panel report on MAD options and discretions, p 19, ref. CESR/09-1220, available at www.cesr-eu.org

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259 The provisions of the Directive which provide for such flexibility and the resulting divergence have been mapped by CESR in their Review Panel report "MAD – Options, Discretions and Gold Plating, 2009", CESR/09-1120, January 2010.

260 Report of the High Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière

261 Communication for the Spring European Council, Driving European Recovery, COM(2009) 114 final, 4.3.2009, p. 6.

7.4.2. *Accepted market practices differ across EU (Article 1.5 of Directive 2003/6/EC and Articles 2 and 3 of Directive 2004/72/EC)*

Accepted market practices (AMPs) are behaviours that can reasonably be expected in one or more national markets and are accepted by the competent regulatory authority as not constituting market abuse. The concept of AMPs was intended to reflect the fact that the characteristics of each market may differ and as such, a particular practice may well be appropriate for one market but inappropriate for another where the conditions differ. They can allow for a flexible and swift approach by regulators for setting the boundaries inside the financial markets and provide legal certainty to market participants.

Therefore, the MAD framework provides a defence for AMPs in the relevant Member State. There is no manipulation if a person who trades or issues orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned. The use of the concept of AMPs by national regulators has been limited in practice - currently, there are only eight AMPs listed on the CESR website[262].

The difficulty in relation to AMPs is that they provide scope for divergent implementation by Member States. More precisely, a practice could be considered market manipulation in one Member State but be granted a safe harbour as an AMP in another. Such a situation, even if it may be justified by local specificities, may be problematic, does not contribute to an integrated financial market where participants should be able to rely on the same framework applying across the EU[263].

While some stakeholders have argued that it is necessary for such practices to continue to be agreed at national level to take account of market specificities[264], others consider that more coordination between regulators, or even harmonisation, of AMPs at EU level would enhance the single market[265].

7.4.3. *Disclosure of inside information by issuers*

Article 6.1 of Directive 2003/6/EC makes it compulsory for issuers of financial instruments to inform the public as soon as possible of any inside information which directly concerns those issuers. The purpose of this requirement is to ensure that inside information available to the issuers is not unjustifiably withheld from the markets, but is disclosed and may be priced as soon as possible. However, this

262 http://www.cesr-eu.org/index.php?page=contenu_groups&id=51&docmore=1#doc

263 ESME report (2007), p. 16.

264 See responses to the Public Consultation from Comision Nacional de Mercados de Valores (CNMV), European Banking Federation (EBF), Association of Corporate Treasurers, Association of British Insurers, Irish Stock Exchange, German Finance Ministry.

265 See responses to the Public Consultation from NASDAQ OMX, Chi-X Europe, Federation of European Stock Exchanges (FESE), UEAPME, Dutch Finance Ministry and regulator, Czech Ministry of Finance

provision is complemented by the deferred disclosure mechanism set out in Article 6.2 [266], which allows issuers under specific conditions to delay the public disclosure.

The conditions for delaying disclosure are (i) the existence of a legitimate interest of the issuer, (ii) that such an omission would not be likely to mislead the public and (iii) that the issuer is able to ensure the confidentiality of the information. The disclosure duty and the possibility to delay this disclosure play a very important role in the day-to-day operation of the MAD and of the functioning of the financial markets as a whole, as they complement and amend the periodic information disclosed by issuers.

When considering whether or not to delay the disclosure of inside information to the markets, issuers have to take legal advice to ensure that the above-mentioned conditions for delay are met, because they would be in breach of the Directive if they delayed disclosure and this was not the case.

In this regard, some issuers have signalled difficulties with interpreting and following the specific conditions under which the disclosure of inside information can be delayed[267]. These concern in particular the requirements that: (i) deferred disclosure should not mislead the public and (ii) confidentiality of the inside information is preserved. Additionally, recent cases have highlighted that the provisions may be crucial for the handling of emergency situations at banks or other financial institutions in distress, with clear implications for financial stability[268]. The ESCB has also asked the Commission whether some clarification is needed so that it would be made 100% clear that emergency lending assistance (ELA) to a listed bank can remain undisclosed if it is the interests of financial stability. Therefore, it seems necessary to consider whether some standard conditions for delayed disclosure should be clarified and/or amended, or special conditions imposed relating to delayed disclosure of information of systemic importance (such as emergency lending assistance).

7.4.4. Clarification of scope of managers' transaction reporting obligations

As described in more detail in section 3.3.2. below, managers' transaction reports serve important purposes by deterring managers from insider trading and providing useful information to the market about the views of managers about how share prices in the company may move in the future.

However, regarding the scope of the reporting obligation there is a lack of consistency and clarity among Member States about whether transactions need to be

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266 *"An issuer may under his own responsibility delay the public disclosure of inside information (...) such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information".*

267 See e.g. ESME report.

268 With regard to the Northern Rock, competent authorities needed to establish whether delaying information in the situation of the bank was possible even though confidentiality of inside information could not be ensured and whether any such delay would not mislead the public (See notably the House of Common's report of January 2008). In the case of Société Générale, competent authorities needed to consider whether the delay in revealing the fraud and the implied increase in capital would not mislead the public.

reported in the case of managed portfolios when the decision is not taken by the manager himself, or in situations where the manager pledges or lends their shares.

7.5. Problem 5: Disproportionate administrative burdens on issuers, especially SMEs

7.5.1. Insider lists

The MAD introduced an obligation to draw up and update insider lists for issuers or persons acting on their behalf or for their account[269]. These lists must indicate the persons working for the issuer who have access to insider information. The aim of introducing the insider lists was twofold: to assist competent authorities in their investigatory powers; and to act as a deterrent against potential insider dealing practices.

The insider lists have proved very useful for the competent authorities and are very much used in their investigations, according to the feedback received from the members of the European Securities Committee and members of the Committee of European Securities Regulators[270], as well as from the responses to the call for evidence[271]. Insider lists are used by the competent authorities to provide a 'first instance' tool in market abuse inquiries. The Member State competent authority can then request additional information from the issuer if necessary at a later stage.

On the other hand, market participants[272] in particular have been critical about the requirement to draw up insider lists because of: considerable compliance and administrative costs; uncertainty about the duties of insiders other than issuers (i.e. persons acting on their behalf or for their account) in respect of drawing up and maintaining insider lists; and divergent requirements introduced by Member States concerning the type of information to be provided when drawing up insider lists, which for multi-listed companies leads to additional compliance and administrative costs[273].

Some competent authorities, such as for example in the UK, only require financial institutions to include the first name and surname of each individual included on the insider's list, except when more than one individual on the same list has the exact same name. Further details of individuals on the insider list can then be gathered at a later stage, should a competent authority submit such a request. However, other competent authorities require that the data to be entered for each individual insider must include first and family names, date and place of birth, and both private and business addresses. For multi-listed companies this leads in practice to drawing up and maintaining different insider's lists for each jurisdiction in which their financial instruments are traded. Alternatively, they are likely to use a single, Europe-wide approach to producing their insider lists; consequently they tend to produce their lists

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269 Article 6.3 of Directive 2003/6/EC and 5 of Directive 2004/72/EC.

270 See the CESR's Guidelines - MAD Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market of 15 May 2009, p. 4.

271 See the responses to the Call for evidence of 20 April 2009 and the Consultation of 28 June 2010 at http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.

272 See ESME report pages 10-13.

273 See response by Herbert Smith to the call for evidence, 15 June 2009, p. 6.

in accordance with the most detailed requirements imposed on them, even if such a solution is not required by the majority of regulators who supervise the company[274].

7.5.2. *Disclosure of managers' transactions*

The obligation to report managers' transactions has two major purposes:

- to deter insider trading by managers;
- to provide information to the public that may be useful to indicate managers' views of the future development of share prices of companies they manage.

However, according to some stakeholders, the administrative burden associated with this measure[275] may have outweighed the overall benefits of reporting private transactions by the issuer's management. Currently the threshold for transactions reporting is set by Directive 2004/72/EC at the level of 5 thousand euro[276], which the majority of respondents to the public consultation considered to be much too low. Some stakeholders such as the Association of Italian Issuers (Assonime) have argued that the low level of the threshold has resulted in markets being flooded with irrelevant information. In Italy, before the Market Abuse Directive was introduced, managers' transactions were regulated by the Italian Stock exchange. Immediate disclosure was required for significant transactions of a value of 250,000 euro, and every three months of transactions of 50,000 euro (calculated on a yearly basis). Under those rules 1600 transactions were notified within a year (from 1 April 2005 till 31 March 2006). After the entry into force of the MAD the number of notified managers' transactions jumped significantly in Italy: to 3785 (from 1 April 2006 to 31 March 2007) and to 4888 (from 1 April 2007 to 31 March 2008)[277].

When we compare the level of the threshold which triggers the obligation to report transactions by managers with the level of managers' remuneration, it may be said that the relation between the two has not been taken into account. One study concerning the structure and level of executive remuneration in 2008, which has been conducted in 8 Member States (UK, Germany, France, Italy, Spain, Netherlands, Belgium and Sweden), shows that total average remuneration for CEOs increased to 226.400 euro monthly in 2008. The same study indicates that the level of executive remuneration has been increasing rapidly in the last 4 years (an increase by 73% from 2004 to 2008). Even if this data is not representative for senior management at all EU issuers, it could be taken as an indication that the threshold for reporting

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274 See the response of the International Capital Markets Association to the call for evidence of 20 April 2009, p.11.

275 The measure imposes an obligation on *"persons discharging managerial responsibilities within an issuer (...) and, where applicable, persons closely associated with them"* to *"notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives (...). Member States shall ensure that public access to information concerning such transactions (...) is readily available as soon as possible"*.

276 The threshold set by the Directive is not obligatory and Member States may apply no minimum threshold or provide for one amounting up to 5000 euro, calculated on a yearly basis.

277 Data provided to the Commission services by Assonime.

managers' transactions is currently set far too low when compared with managers' remuneration.[278]

Respondents to the public consultation have also raised concerns that there is no consistency or clarity about how to treat a transaction in the case of managed portfolios when the decision is not taken by the manager himself or in situations where the manager pledges or arranges for their shares to be borrowed. They have also raised the problem that persons closely related to a manager are not bound to disclose relevant information to the manager himself in order for him to fulfil the transaction reporting obligation.

Moreover, the provisions of the directive are not very clear on the relationship between the obligation to notify the regulator about managers' transactions and the obligation to ensure public access to information on such transactions[279].

7.5.3. The specific situation of SMEs

Small and medium sized enterprises (SMEs) significantly contribute to economic growth, employment, innovation and social integration in the European Union[280]. According to a survey by the European Central Bank in 2009, the main source of funding for such companies is private financing by banks (32%);, in contrast, only 0.9% of SMEs had issued debt securities and 1.3% had issued equity[281]. Some stakeholders have argued that this is in part because the initial and ongoing costs of listing outweigh the benefits for SMEs and that EU legislation represents a barrier which is too high for SMEs[282].

Specialised SME markets[283] aim at providing smaller, growing companies with a platform to raise capital both through initial offerings and ongoing fund raisings. Currently, these SME markets mostly fall within the MTF regime under MiFID. Some stakeholders argue that by extending the MAD to instruments only traded on MTFs all issuer specific obligations of MAD (as well as prohibitions) would also apply to SMEs, and without a simplification of the regime this would add additional costs to smaller companies to access the market[284]. The obligations to disclose price sensitive information, draw up insider lists and disclose managers' transactions are those particularly identified by stakeholders as problematic in this regard[285].

The requirement for an issuer to inform the public as soon as possible of inside information which directly concerns the issuer, requires an issuer to constantly

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278 For more details please see: Presentation “Key Statistics and shareholders scrutiny” by Mr Caprasse on level of EU remuneration (based on 9 largest market capitalisations) http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm

279 This is confirmed by the CESR report on options and discretions (ibid).

280 Of the 20 million active enterprises of the non-financial business economy, 99.8% are SMEs and more than two thirds (67.4%) of the EU-27’s non-financial business economy workforce are employed by SMEs, *European Business – Facts and Figures*, Eurostat (2009).

281 Survey on the access to finance of small and medium-sized enterprises in the euro area, European Central Bank, September 2009, p. 4.

282 Fabrice Demarigny, *An EU-listing Small Business Act,* March 2010, p. 13

283 There are currently 14 specialist markets for SMEs that operate across Europe, including AIM and AlterNext.

284 See response by European Issuers to public consultation, 27 July 2010, p. 2.

285 See response by European Issuers to call for evidence, 15 June 2009, p. 1.

monitor information it has and to exercise judgment and seek advice about whether and when information needs to be disclosed to the public. A study by external consultants for the Commission services estimates the cost for SMEs of identifying inside information to be disclosed at EUR 2,000 per SME per year[286]. In practice, some operators of SME markets therefore impose modified or simplified disclosure requirements for SME issuers but recognise that disclosure of such information is essential for SME investors.

Stakeholders representing the interests of SMEs also take the view that the requirement to draw up and update insider lists creates significant expense and management burdens for smaller quoted companies and that the MAD regime needs to be simplified[287]. The yearly cost of implementing, maintaining and updating the list of insiders is estimated at EUR 1,400 per SME per year, a cost which can be considered to represent 100% administrative burden[288]. Some stakeholders also consider that an adapted regime for SMEs is necessary in relation to the disclosure of managers' transactions, on the grounds that they are burdensome and time-consuming.[289].

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286 EIM, *Effects of the changes in the Market Abuse Directive – Impact on Administrative Burden of Firms in the EU*, EIM, December 2010, p. 31.

287 The Quoted Companies Alliance, response to the consultation, 28 July 2010, p.4; EuropeanIssuers, response to the consultation, 27 July 2010, p. 2; see also the report prepared by Fabrice Demarigny in March 2010 on *"An EU-Listing Small Business Act"*, available at: http://www.eurocapitalmarkets.org/node/446.

288 EIM (2010), p. 32.

289 The Quoted Companies Alliance, response to the consultation, 28 July 2010, p. 4.

ANNEX 8 – DETAILED ANALYSIS OF IMPACTS OF OPTIONS

This section discusses the advantages and disadvantages of the different policy options against the criteria of their effectiveness in achieving the related objectives (to be specified for each basket of options), and their efficiency in terms of achieving these options for a given level of resources or at least cost.

The options are measured against the above-mentioned pre-defined criteria in the tables below. Each scenario is rated between "---" (very negative), 0 (neutral) and "+++" (very positive). The assessment highlights the policy option which is best placed to reach the related objectives outlined in section 5 and therefore the preferred one.

8.1. Analysis of impacts of policy options

8.1.1. Policy options to ensure organised markets, new platforms and OTC transactions are appropriately regulated

These options will be assessed against their effectiveness in achieving the specific objective of ensuring regulation keeps pace with market developments. These policy options will also be assessed on their efficiency in achieving these objectives for a given level of resources or at least cost while avoiding unduly negative effects on market efficiency. However, options will also be assessed against other objectives where appropriate.

8.1.1.1. Option 5.1.1 – take no action at EU level

If no action is taken, then the extent to which the Directive applies to instruments not traded on a regulated market will remain to be determined under national law which could lead to varying levels of protection for investors trading such instruments in different markets. The objectives of increasing investor protection and market integrity will therefore not be met, and gaps in regulation of these instruments will continue to exist in Member States not covering them in national law. The divergent approaches taken by Member States will continue and an unlevel playing field will remain. In the cases of derivatives (such as credit default swaps) uncertainty would remain in specific situations about whether abusive behaviour using such instruments is covered by the Directive.

8.1.1.2. Option 5.1.2 – extend rules on market abuse to Credit Default Swaps (CDS)

Under this option the definition of a financial instrument in the MAD would be aligned with the definition in MiFID. Further clarification would also be provided in Article 9 of the MAD that a credit default swap is an instrument covered under the second paragraph of that Article (i.e. an instrument whose value can depend on another financial instrument).

This option would provide further clarity to market participants about which instruments, especially derivatives, are covered by the Directive. While in substance the definitions are very similar, the MiFID definition sets out in more detail than the MAD definition the instruments, especially financial, commodity and other

derivatives it applies to. It would also clarify that credit default swaps cannot be used for market abuse. To the extent that it will more clearly prohibit the use of such derivatives for market abuse purposes and enable enforcement action in relation to such behaviour it will promote greater market integrity and investor protection.

The disadvantage to this option is that the MiFID definition includes some more exotic or unusual derivative instruments which would fall within the scope of MAD. However, this is mitigated by the fact that the MAD applies to instruments when admitted to trading on a market so such instruments would only be covered if a market in some form exists for the instrument. So this would reduce the possibility of MAD applying to instruments where it is inappropriate.

8.1.1.3. Option 5.1.3 - extend rules on market manipulation to OTC instruments

Under this option clarification would be provided in the definition of market manipulation and in Article 9 that the use of related instruments, such as OTC derivatives or CDS, to manipulate the underlying market is prohibited.

This option would meet the general objective of increasing market integrity and the protection of investors as it would explicitly prevent the use of related instruments to manipulate the underlying market. It would also meet the objective of achieving a level playing field as market manipulation using such instruments would be prohibited in all Member States, whereas currently only some Member States clearly prohibit such behaviour.

Over three quarters of respondents to the public consultation who expressed an opinion on this option expressed support for extending the scope in this way. There was limited opposition, although some respondents felt that the current regime already covered these products to a sufficient extent.

8.1.1.4. Option 5.1.4 – extend market abuse rules to instruments only traded on MTFs

Under this option the scope of the Directive would be extended to apply to any financial instrument only admitted to trading on a MTF (irrespective of whether the transaction in that instrument takes place on that MTF).

This option would meet the general objectives of promoting greater market integrity and protecting the increasingly diverse range of investors who use MTFs. By definition if an instrument is traded on an MTF it will tend to be more liquid, standardised, have a broader range of investors (institutional and sometimes retail) and be the subject of a certain amount of public information, so the Directive can be easily applied to such instruments. This option will also meet the objectives of achieving a level playing field and eliminating options and discretions by harmonising an area which is currently subject to widely diverging approaches.

The option has the disadvantage that MTFs tend to trade many different types of instruments and so some obligations under the directive may not always be proportionate given the nature of the different issuers. For example, issuer obligations under the Directive are arguably more costly for SME issuers relative to their size. But this issue could be addressed by nuancing the application of those obligations to such issuers (see options in section 5.7).

Another disadvantage of this option is that, if adopted in isolation, instruments only admitted to trading on other organised trading facilities would remain outside the scope of the MAD (see option 5.1.5 below). This would mean unequal protection of investors and market integrity on organised trading venues with many similarities to MTFs and could lead to possibilities for regulatory arbitrage.

There was strong support in the public consultation for the extension of MAD to instruments solely traded on MTFs. Respondents acknowledged the growth of MTFs and their significance in current markets. However, some respondents commented that some Member States had already modified local regimes to accommodate specialist MTFs; for example specialist SME markets. These respondents felt that current bespoke regimes for these MTFs were appropriate, that harmonisation would need to encompass these different evolutions, and that this may be a difficult task.

8.1.1.5. Option 5.1.5 – extend market abuse rules to instruments only traded on other trading facilities (other then MTFs)

Under this option the scope of the Directive would be extended to instruments only traded on an organised trading facility. An organised trading facility would be defined in a very general manner, most probably by a reference to a definition to be introduced in the revision of the MiFID, to cover any facility or system operated by an investment firm that brings together client orders or interests relating to financial instruments and that is not classified as a regulated market, MTF or systematic internaliser. This definition would be broad and include a voice broking facility, a swap execution facility, a broker crossing system and any other type of system or facility that is used by an investment firm.

This option would have the advantage that it would meet the specific objective of ensuring regulation keeps pace with market developments as well as the objective of increasing protection for investors who trade in instruments on such facilities that are not traded on a regulated market (and therefore covered by the current MAD) or MTF (which would be covered by option 5.1.4). It would also meet the objective of improving market integrity by applying the MAD to instruments not traded on regulated markets or MTFs but for which there is a market of some form. By introducing a harmonised approach at EU level across Member States it would also meet the objective of a level playing field.

Increased market integrity and investor protection would be especially relevant to facilities such as systems trading credit default swaps where there is significant liquidity and diversity of investors. For facilities such as crossing networks the proposal is likely to be of limited relevance as the directive is already likely to apply as such facilities will typically trade liquid instruments already admitted to trading on a regulated market or MTF.

The disadvantage of this option is that this category covers a broad range of instruments and a very diverse range of different types of facilities. It may not be easy to apply the concepts in MAD to some instruments or facilities and this may create legal uncertainty and practical difficulties for operators and users of the facility and issuers in understanding and applying the MAD. However this risk could

be mitigated by calibrating the application of MAD, depending on the type of instrument, so that it applies in a proportionate manner.

8.1.1.6. Option 5.1.6 - extend market abuse rules to instruments only traded OTC bilaterally

Under this option the scope of the Directive would apply to instruments only traded outside a regulated market, MTF or organised trading facility.

This option would have the advantage that it would ensure complete coverage of trading in financial instruments by the MAD. But there are not likely to be any benefits in terms of increased investor protection and market integrity as these are essentially private transactions between two parties that are negotiated commercially. The parties are likely to be able to protect their own interests in any bargaining and there is no market as such for the instrument that is being affected by the transaction.

Further, this option would create significant legal uncertainty in determining how the MAD rules apply to essentially private and individual commercial transactions. Many such transactions would not ordinarily be considered to be financial market transactions (for example, purchases of businesses or transfers of shares in private companies). The concepts in MAD are aimed at applying to transactions in standardised instruments that are relatively liquid, traded by a variety of investors and for which there is a sufficient level of public information about the instrument concerned. Private transactions do not meet these requirements and the MAD could not be applied sensibly to such transactions. Accordingly parties to such transactions could be subjected to onerous and costly obligations that are not appropriate.

8.1.1.7. Option 5.1.7 – improve supervision of HFT

Under this option, specific strategies by way of automated trading that may be contrary to the prohibition on market manipulation would be prescribed in level 2 measures.

This option would meet the objective of ensuring regulation keeps pace with market developments. This option would also have the advantage that it would create greater legal certainty by specifying the current definition of market manipulation, which while broad enough to capture different strategies and forms of trading that may be manipulative would benefit from clarification. It would provide greater clarity to market participants and help supervisors to enforce breaches of the existing provisions involving automated trading. This option has the potential disadvantage that there could be other automated trading practices that do not constitute market abuse, but could nevertheless have other adverse consequences for the efficiency of the market (e.g. flash orders), which would not be covered.

Most respondents to the public consultation did not address this option specifically in their responses, although there was specific support for it from some stakeholders.[290]

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[290] The Association of British Insurers, Autorité des marchés financiers and Ministère de l'économie, de l'industrie et de l'emploi.

8.1.1.8. Option 5.1.8 – Improve supervision of investment firms operating trading facilities such as MTFs

According to the MiFID rules MTFs can be operated either by market operators or by investment firms[291]. As a consequence the monitoring obligations in Article 26 of MiFID apply to market operators and investment firms alike. However, the obligation to adopt structural provisions aimed at preventing and detecting market manipulation practices in Article 6 paragraph 6 MAD only applies to market operators. This option would close that gap in the existing regulatory framework and the obligation would be extended to investment firms operating an MTF and to all entities operating an organised trading facility as described under Option 5.

Implementing the option would have the advantages of ensuring regulation keeps pace with market developments, contributing to levelling the playing field between entities operating trading venues, providing legal certainty as to the obligations applying under European law and enhancing investor protection by emphasising that structural provisions against market manipulation have to be adopted by all trading venues.

A disadvantage could be that the regulatory costs imposed by the market abuse framework on firms operating MTFs or organised trading facilities would increase. However, this would be mitigated by the fact that trading venues will already have certain arrangements in place to comply with their MiFID obligations and also due to demand from investors and issuers who want to trade and have their instruments traded in a properly protected environment.

Respondents to the public consultation generally supported this option, although some noted the difficulties that a trading venue may have in monitoring its market – such as market fragmentation and multiple listings, sharing of data, and understanding the reasoning of transactions.

8.1.1.9. The preferred options

	Impact on stakeholders	Effectiveness	Efficiency
Option 5.1.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.1.2 (align the definition of financial instrument with the MiFID definition and clarify application of MAD to CDS)	*(+) regulators have increased clarity about instruments covered by the MAD and their ability to enforce is assisted* *(++) investors receive greater protection* *(+) market integrity is increased for investors*	*(++) achieves specific objective* *(++) increases investor protection and* *(++) market integrity by ensuring market abuse through CDS is clearly prohibited*	*(0)*

[291] Cf. Articles Para 1 No 15 MiFID.

Option 5.1.3 (extend scope to cover market manipulation by use of related instruments)	*(++) regulators have clearer mandate to take action against manipulative behaviour using other instruments* *(++) investors in a market are better protected from use of other related instruments to manipulate the underlying market*	*(++) achieves specific objective for instruments traded OTC (such as derivatives) which impact on prices of related instruments traded on trading venues or facilities* *(++) increases investor protection as manipulation of financial instruments traded on trading venues or facilities through related instruments (such as derivatives) will be prohibited and* *(++) increases market integrity by ensuring market manipulation through related OTC instruments is prohibited*	*(0)*
Option 5.1.4 (extend the MAD to financial instruments traded only on a MTF)	*(++) investors trading instruments only traded on a MTF receive greater protection* *(+) there is improved market integrity for instruments only traded on MTFs*	*(++) achieves specific objective for MTFs* *(++) increases investor protection on MTFs* *(++) increases market integrity of MTFs*	*(0) SME issuers listed only on MTFs could face increased costs to disclose inside information and keep insider lists in accordance with MAD but these would be mitigated by SME specific options below* *(-) some MTF operators could face some increased costs of monitoring for MAD compliance by issuers and investors*
Option 5.1.5 (extend the MAD to instruments only traded on other trading facilities (other than MTFs))	*(++) increased protection and market integrity for investors on such facilities* *(-) possible legal uncertainty for operators, investors and issuers in applying the MAD to differing instruments and facilities – could be mitigated by calibration of measures*	*(++) achieves specific objective for organised trading facilities* *(++) increases investor protection on OTFs* *(++) increases market integrity of OTFs*	*(-) issuers could face increased costs to disclose inside information and keep insider lists in accordance with MAD, but these costs could be mitigated by calibration of measures* *(-) some operators of facilities could face some increased costs of monitoring for MAD compliance by issuers and investors*
Option 5.1.6 (extend market abuse rules to instruments traded purely OTC)	*(0) negligible effect on investor protection since instruments are traded privately* *(--) un certainty for users and issuers about when and how the MAD applies to instruments*	*(+) partially achieves specific objective,* *(0) negligible effect on investor protection as there is no market to protect from abuse in the case of purely*	*(--) increased compliance costs for parties to private transactions to determine if and how Directive applies to them.*

		bilateral OTC transactions and *(0) negligible effect on market integrity for the same reasons as above*	
Option 5.1.7 (provide examples of specific algorithmic or HFT strategies that constitute market manipulation)	*(++)greater clarity will help regulators to take enforcement action against automated trading strategies that are manipulative* *(++) greater clarity will help prevent and provide increased protection for other investors against manipulative strategiess*	*(++)achieves specific objective without compromising broad scope of existing definition of market manipulation* *(++) increases investor protection and* *(++) market integrity by making it easier for regulators to sanction market abuse through automated trading strategies*	*(0)*
Option 5.1.8 (Improve monitoring for market abuse of investment firms operating trading facilities such as MTFs and OTFs)	*(++) regulators can benefit from structural provisions implemented by venues against market abuse in carrying out their role of preserving market integrity* *(++) investors are better protected against market abuse on MTFs and OTFs* *(+) issuers would have more certainty that their instruments are traded in a properly protected environment*	*(++) achieves specific objective* *(++) also achieves objectives of increasing investor protection and* *(++) market integrity*	*(0) firms operating platforms could face increased costs, however, these will in most cases be mitigated due to arrangements already in place*

Over three quarters of respondents to the public consultation who expressed an opinion on option 5.1.3 expressed support for extending the scope in this way. There was limited opposition, although some respondents felt that the current regime already covered these products to a sufficient extent. There was strong support in the public consultation for the extension of MAD to instruments solely traded on MTFs. Respondents acknowledged the growth of MTFs and their significance in current markets. However, some respondents commented that some Member States had already modified local regimes to accommodate specialist MTFs; for example specialist SME markets. These respondents felt that current bespoke regimes for these MTFs were appropriate, that harmonisation would need to encompass these different evolutions, and that this may be a difficult task.

Most respondents to the public consultation did not address option 5.1.7 specifically in their responses, although there was specific support for it from some stakeholders.[292] Respondents to the public consultation generally supported option 5.1.8, although some noted the difficulties that a trading venue may have in monitoring its market – such as market fragmentation and multiple listings, sharing of data, and understanding the reasoning of transactions.

292 The Association of British Insurers, Autorité des marchés financiers and Ministère de l'économie, de l'industrie et de l'emploi.

The highest scoring policy options are options 5.1.2, 5.1.3, 5.1.4, 5.1.5, 5.1.7 and 5.1.8. These options are not mutually exclusive and in several respects reinforce each other. MTFs and OTFs can share certain characteristics, for example they are electronic, they can be operated by investment firms, they can admit to trading financial instruments not admitted to trading on a regulated market. Therefore including OTFs within the scope of market abuse rules (option 5.1.5) in addition to MTFs (option 5.1.4) would ensure that trading facilities with similar characteristics are subject to the same rules and investors on both types of platform benefit from the same protection. If adopted in isolation, either option 5.1.4 or option 5.1.5 could leave scope for those wishing to commit market abuse to migrate to the other electronic platform. So the combination of the two options ensures greater market integrity and better protection of investors than either option alone.

Similarly, if option 5.1.3 (extending scope to OTC instruments) were not combined with options 5.1.4 and 5.1.5, this would leave scope for market manipulation by OTC instruments to impact financial instruments traded on regulated markets, MTFs or OTFs. Combining the three options gives a more optimal result in terms of the objective of market integrity and investor protection. Combining option 5.1.2 with the above options would ensure that it is beyond doubt that CDS are within the scope of market abuse legislation, which is important also as these instruments are often traded on OTFs as well as OTC.

Option 5.1.7 adds to the combined effect of the above-mentioned options by further ensuring that they keep pace with market developments, as it will enable the Commission to clarify if specific new strategies employed by algorithmic or high frequency trading fall within the definition of market manipulation. Finally, combining option 5.1.8 with the above options ensures that the different types of trading venues and facilities which are within the scope of market abuse legislation are subject to similar requirements to monitor transactions to detect possible market abuse. Option 5.1.8 therefore also reinforces the options in section 6.1.3.1 seeking to strengthen the powers of competent authorities to detect and sanction market abuse.

In light of the above, the preferred option is a combination of options 5.1.2, 5.1.3, 5.1.4, 5.1.5, 5.1.7 and 5.1.8.

8.1.2. Policy options to ensure commodities and related derivatives are appropriately regulated

These options will be assessed primarily against their effectiveness in achieving the specific objective of ensuring regulation keeps pace with market developments. These policy options will also be assessed on their efficiency in achieving these objectives for a given level of resources or at least cost while avoiding unduly negative effects on market efficiency. However, options will also be assessed against other objectives where appropriate.

8.1.2.1. Option 5.2.1 – Take no action at EU level.

This option entails that MAD provisions with regards to inside information in relation to commodity derivatives remain unclear. As a result, investors in commodity derivatives markets and producers who use these markets for hedging

purposes continue to face uncertainty as to the information that they can expect to receive in relation to the underlying commodity markets. Further, regulators will continue to face gaps with regards to the relevant information from both physical and financial markets needed to monitor abuse effectively.

With regards to all financial instruments, MAD requires price sensitive information to be made available to the public by the issuer. However, inside information typically concerns the underlying commodity and not information about the derivative itself. It is therefore not the issuer of a derivative who is in possession of information that affects the price of the derivative. Such information typically lies with producers, transporters, and others involved in the primary market. For commodity derivatives, MAD only clarifies that investors may expect to receive information that is required to be disclosed by rule or custom.

8.1.2.2. Option 5.2.2 – Apply financial rules to commodity spot markets

Under this option, the definition of inside information would be extended to include information which a reasonable investor would take into account when deciding whether or not to buy or sell a commodity. In order to ensure that all such information is made available, the obligation to inform the public of inside information would be extended to all market participants. The definition of market manipulation would be extended to transactions or orders to trade which distort commodity prices.

The advantage of this option is that it addresses the key problem of a lack of transparency of fundamental commodity market information. It also introduces a prohibition on market manipulation for markets where this currently does not apply.

Also, it introduces a comprehensive set of rules which apply to both spot and derivatives markets. Ensuring that all market participants, including public bodies, publish inside information, will improve price formation in commodities markets. It will also create a level playing field for all investors, who will have all relevant information needed to make their investment decisions. Furthermore, it will create a level playing field for all commodity markets, as the same rules will apply across all markets. The comprehensive set of rules allows for holistic oversight, and will ensure adequate oversight in commodity markets where this is currently lacking.

The main disadvantage of this approach is that financial market rules are inappropriate for most commodity markets. Unlike physical commodities whose production varies across the world depending on, for example, weather patterns or geopolitical and trade developments, financial instruments are often electronic and dematerialised documents or book-entries tied to a specific issuer or jurisdiction for purposes of capital-raising or financial risk management. Their fungibility and portability characteristics are often entirely different. Financial regulators are also not best placed to assess commodity market specificities or the impact of the forces of nature (e.g. on harvests) on markets ranging from agricultural products, metals and oil to electricity, and gas.

In addition to being heterogeneous, commodity markets also vary in their degree of sophistication and liquidity. The products traded may not be sufficiently

standardised, and there may be strong business secrecy issues about disclosing a company's production, stocks, or supply chain issues. Extending financial rules would thereby not only impose compliance costs on all market participants, but also limit their opportunity to hedge their business risk, and may even impact their business directly.

Further, a general approach to commodity markets will require competent authorities to extend their activities to a wide set of large and different markets. They may not have the necessary manpower, tools, and expertise to monitor these markets, and clearly discerning what practices in the physical market would be considered as abusive would present innumerable legal and practical problems. For example, to determine whether an attack by a rebel group on a pipeline in the EU (or indeed outside it) would be market abuse rather than another kind of criminal activity.

An additional disadvantage is that trading in the underlying commodities often may take place outside the EU (either partially or totally) so that EU rules would not be effective to address concerns for the market as a whole. This would also invite regulatory arbitrage.

8.1.2.3. Option 5.2.3 – define inside information for commodity derivatives

Under this option, the definition would be clarified so that in relation to commodity derivatives, inside information would mean information of a precise nature which has not been made public, relating directly or indirectly to one or more such derivatives or the underlying commodities and which if it were made public would be likely to have a significant effect on the prices of such derivatives or the underlying commodities, notably information which is required to be disclosed in accordance with legal or regulatory provisions at EU or national level, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market. This should not be taken to imply that EU rules could be supplemented by national rules, but as a non-exhaustive list of the types of legal or regulatory provisions that might apply to a market.

The main advantage of this option is that it would meet the objective of ensuring regulation keeps pace with market developments, by closing the regulatory gap left by the current MAD definition, which does not capture all relevant information relating to commodity derivatives. This would ensure more legal certainty, by bringing the definition of inside information for commodity derivatives closer to the general definition of inside information. This legal certainty is good for investors, because it allows them to form clear expectations of the information they can expect to receive. It is also good for producers who use these markets for hedging purposes. For them, the unclear prohibitions with regards to insider dealing and market manipulation introduce uncertainty as to when they are required to disclose or when they are allowed to trade. This clarification would introduce a norm that is directly applicable, and is well understood by financial market participants. While rules and customs may vary from market to market, the clarification that inside information is price sensitive information would impose a uniform norm that applies to all derivatives markets.

A second advantage is that this option may promote publication of inside information, because it means that primary market participants cannot hedge their exposure in the derivatives market without having disclosed it first. Wanting access to the derivatives market would in such cases be an incentive to disclose information in the underlying market.

This also brings situations such as stockpiling of a commodity and benefiting from this in the derivatives market, as well as squeezes through stockpiling into scope of the MAD. In certain cases, stockpiling may be deemed to be inside information. Disclosing this, would make it difficult to squeeze one's counterparts or benefit from knowing that you hold a significant share of the market.

Another advantage of this approach is that investors will not enter into transactions with parties who have an information advantage over them. This means that the existing financial market norm will apply not only to derivatives markets where the underlying market is a financial market, but to all derivatives markets.

In addition, this option does not affect the underlying market itself. It clarifies what is considered to be inside information in commodities derivatives markets, but it does not say what is considered to be inside information in the underlying market, nor does it impose any disclosure obligation on market participants in the underlying market. It thereby leaves room for sectoral rules to address market integrity issues in the underlying market. While the financial norm would apply to derivatives markets, sectoral rules (where they exist) would continue to govern underlying markets.

A second problem is that producers or other primary market participants will not be able to hedge their position in the derivatives market before having disclosed their price sensitive information. Such behaviour may be considered to be legitimate behaviour in the underlying market and introducing this option would thus make hedging more expensive. This increased cost is tied to the benefit of market participants not trading against inside information.

The increased costs of hedging are expected to balance out against the benefits of improved price formation. When a market participant hedges his future needs before disclosing them, he will do so at the current market price. This means that his counterparts get a lower price than they would have had the information been disclosed. When a market participant hedges his future needs after disclosing them, he will do so at a higher market price. This will be at the expense of the market participant who is hedging, but it will be a benefit for the rest of the market.

The disadvantage of this approach is that it still does not create an obligation on market participants in the underlying market to disclose inside information. As a result, the circumstances under which investors would expect to receive inside information will continue to be governed by diverging rules. It also means that not all inside information will be published. Also, this approach does not address the question of insider dealing in the underlying market. Only market participants who are active in both markets will need to disclose their price sensitive information,

while those only active in the underlying market do not and will continue to be allowed to trade on this information.[293]

However, it is not the purpose of financial regulation to govern non-financial markets. Would not be effective as markets are international, fragmented, different rules apply to different commodities, different market structures. Price transparency of heterogeneous products is misleading. This disadvantage would be better addressed by sectoral legislation, such as the recently adopted Commission proposal for a regulation on energy market integrity and transparency, and for emission allowance markets by an upcoming Commission initiative in this area.

This option was raised in the public consultation and generated diverse opinions. Approximately one third of respondents to the public consultation were in favour of this option. This included strong support from regulators. There was strong opposition from energy companies and associated bodies, who supported coordination with the proposal for a regulation on energy market integrity and transparency, while approximately one third of respondents had no strong opinion.

8.1.2.4. Option 5.2.4 – obligation for spot market traders to respond to information requests from competent authorities

Competent authorities have the power to demand information from any person. However, there is an information gap for markets where there are no market transparency rules in spot markets, or where there is no reporting obligation to sectoral regulators. In those markets, competent authorities will not be able to access spot market data on a regular basis.

The power to request information from any person will typically allow competent authorities access to all information needed to investigate suspicions of possible market abuse. However, such information may not be sufficient to allow competent authorities to detect possible market abuse in markets where there is no sectoral authority for oversight. Notably, non-financial firms will not have the same obligations towards the competent authority that investment firms have.

The advantage of this option is that it will allow competent authorities access to continuous data. By requiring such data to be submitted in a specified format, they will not have to expend resources to collate information from different data sources. By gaining access to spot market traders' systems, they will also be able to monitor real-time dataflows where needed.

Spot market traders have no obligation to report suspicious trading by themselves or their clients to competent authorities. In line with the existing requirement on financial firms to report such incidents on an ongoing basis, competent authorities would be able to require spot traders to submit reports of suspicious trades within their firm. This would not impose on them the obligation to monitor for suspicious reports on an ongoing basis.

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[293] This will be addressed for energy and CO2 markets by the above-mentioned Commission initiatives.

The disadvantage of this approach is that it does not allow competent authorities access to spot market activity being carried out by firms outside the EU. Also, it would impose costs on spot market traders within the EU in order to comply with the requests.

8.1.2.5. Option 5.2.5 – promote cooperation among regulators of financial and physical markets

As underlying and derivatives markets are strongly interlinked, abusive behaviour (both insider dealing and market manipulation) is likely to extend across both markets. This means that supervisors would need to have an overview of both markets in order to be able to detect and sanction such behaviour. At the moment, derivative market supervisors may not have all the necessary information relevant to monitor price formation, nor all trading data needed to monitor trading behaviour. This option would induce financial market regulators to cooperate with existing physical market regulators in order to obtain all the available information they should need. The advantage of this option is that exchange of information between the respective regulators gives them both a consolidated overview of the market, thereby contributing to reducing the risks of market abuse on commodity derivative markets. Exchange of information allows regulators to assess behaviour in their respective markets against the behaviour and impact in the overall market.

In addition to this consolidated view, intensifying cooperation allows both regulators to benefit from each others' knowledge of their respective markets, thereby helping to meet the objective of enhancing the powers and information of regulators. Cooperation with authorities around the world, possibly through ESMA, will require establishing new memoranda of understanding and cooperation agreements. In addition, there will also be ongoing information sharing, assistance in sending information requests, and cooperation in cross-border investigations. The disadvantage of this approach is that supervisors will incur costs for transmitting and processing data. These costs may increase as the data received from both markets may not be compatible. However, as these costs fall only on supervisors and do not extend to a broader range of market participants, they are likely to be very limited compared to the potential gains in terms of market oversight.

In the public consultation this option was not specifically raised. However, the majority of all respondents agreed, to differing extents, that there are key differences between commodity markets and financial markets. In particular it was noted by one respondent that for regulation to be effective there needs to be strengthened co-operation between physical market regulators and financial regulators[294].

8.1.2.6. Option 5.2.6 – require issuers of commodity derivatives to publish price sensitive information

The advantage of this approach is that the issuer of a derivative would serve as a central place to make price sensitive information available. Issuers of such derivatives are usually market operators or financial firms, and may be better placed than other users to serve as a central point of information. The issuer would need to

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make arrangements with key market participants, and monitor newsfeeds that contain information relative to their market. Investors would be able to find this information on the issuer's website. The advantage for investors is that they wouldn't need to go through several feeds to find the information themselves. In addition, the issuer may also have access to information about trading, which is relevant to the market as a whole.

The disadvantage of this approach is that, while an issuer may have better access to information than other users, they still may not have access to all the information that is inside information for the derivative. The issuer may also not be in a position to verify the accuracy of the information. Therefore, what is published could be incomplete, inconsistent and even misleading. Further, information may become available with a time lag compared to news feeds, because it will take the issuer time to gather the information. This would limit the use of this obligation notably for investors who have access to newsfeeds themselves.

Second, this option will impose costs on issuers, who will need to make resources available to gather information on a best efforts basis. These costs may deter issuance of such instruments.

8.1.2.7. Option 5.2.7 – clarify market manipulation for commodity derivatives

The prohibition against market manipulation is currently limited to false or misleading signals as to the supply of, demand for or price of financial instruments. This means that certain forms of manipulation are currently not illegal. This includes both behaviour whereby transactions in the derivatives market are used to manipulate the price of the underlying market, as well as behaviour whereby transactions in the underlying market are used to manipulate the price of the derivatives market. This option contributes to the goal of closing regulatory gaps, by clarifying that the prohibition against market manipulation captures also the latter transactions.

The advantage of this approach is that it allows competent authorities to sanction manipulative behaviour which affects underlying markets without also having to demonstrate a manipulative effect in the derivatives market itself. They would thereby be able to sanction the intended offence, instead of having to focus on its side-effects in order to be able to take legal action. Another advantage is that it allows them to consider other forms of behaviour which affect price formation in the derivatives market.

The drawback of extending the definition to include the impact on underlying markets, is that financial competent authorities would also need to monitor price movements in non-financial markets. Supervisors may not have the market experience, systems and data to do so. Supervisors would not, however, be required to take on market supervision responsibility in the underlying market. Data from the underlying market would aid them in monitoring derivatives markets. In addition, the problem of gaining a consolidated view of commodity and commodity derivatives markets could be solved by option 5.2.3.

	Impact on stakeholders	Effectiveness	Efficiency

Option 5.2.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.2.2 (extend MAD to commodity spot markets)	*(+) insures market transparency and integrity rules apply to all commodity markets* *(+) gives competent authorities a consolidated view over commodity (spot and derivatives) markets* *(-) financial market rules may not be appropriate for market participants in certain markets*	*(-) financial market rules may overlap and conflict with existing sectoral legislation* *(-) commodity markets are global and EU rules will not apply to all relevant firms* *(-) difficult to apply general rules to heterogeneous markets*	*(-) will increase compliance costs for market participants not currently obliged to disclose price sensitive information* *(-) competent authorities may not have the expertise and manpower to monitor spot markets effectively*
Option 5.2.3 (define inside information for commodity derivatives)	*(+) improves legal certainty for producers as to when they need to disclose and are allowed to trade* *(++) clarifies which information investors can expect to receive* *(+) gives supervisors clear benchmark to assess insider dealing*	*(+) captures all information relevant for derivatives prices* *(++) creates information symmetry between investors* *(+) creates incentives for disclosure of inside information* *(--) does not ensure that all inside information will be published-* *(-) those only active in the underlying market will continue to be allowed to trade on inside information*	*(+) does not affect the underlying market itself* *(-) may make hedging more expensive for producers*
Option 5.2.4 (clarify the power to request information from spot market traders)	*(+) improves competent authorities' ability to monitor spot and derivative markets in a comprehensive way*	*(++) allows competent authorities easier access to spot market data*	*(+) less complicated data handling for competent authorities* *(-) imposes additional costs on non-financial market participants to submit information in a specific format, allow access to their systems, and to report suspicious transactions.*
Option 5.2.5 (promote international cooperation among regulators of financial and physical markets)	*(+) gives supervisors a consolidated overview of the market* *(+) allows supervisors to combine their market experience*	*(++) increases market integrity by reducing risk of cross-market manipulation*	*(+) no additional obligations on market participants* *(-) supervisors will incur costs for transmitting and*

			processing data
Option 5.2.6 (require issuers of commodity derivatives to publish price sensitive information)	*(+) provides investors with a single feed to all relevant information*	*(--) published information can be inaccurate or incomplete* *(-) time lag compared to news feeds*	*(+) lowers investor costs of gathering information* *(--) issuer costs may deter issuance of such instruments*
Option 5.2.7 (clarify market manipulation for commodity derivatives)	*(+) allows supervisors to sanction the offence of manipulating commodity markets through derivatives* *(+) allows supervisors to sanction the offence of manipulating derivatives markets through commodity markets* *(+) promotes investor confidence in derivatives markets* *(++) promotes stable prices for producers and users of commodity markets*	*(++) closes the regulatory gap for forms of market abuse that affect commodity markets* *(++) increases protection of investors and* *(++) market integrity*	*(-) financial competent authorities will need to incur costs to gain access to necessary data and extend monitoring capability*

Option 5.2.3 was raised in the public consultation and generated diverse opinions. Approximately one third of respondents to the public consultation were in favour of this option. This included strong support from regulators. There was strong opposition from energy companies and associated bodies, who supported coordination with the proposal for a regulation on energy market integrity and transparency, while approximately one third of respondents had no strong opinion.

In the public consultation option 5.2.5 was not specifically raised. However, the majority of all respondents agreed, to differing extents, that there are key differences between commodity markets and financial markets. In particular it was noted by one respondent that for regulation to be effective there needs to be strengthened co-operation between physical market regulators and financial regulators[295].

The highest scoring policy options are options 5.2.3, 5.2.4, 5.2.5, and 5.2.7. These options are not mutually exclusive and some reinforce each other. The package of preferred options will clarify existing definitions and prohibitions. All preferred options serve to address shortcomings of the existing legal framework, and are therefore expected to yield greater benefits than the baseline scenario of doing nothing.

Commodity derivatives markets are much like other derivatives markets, but they are crucially built on commodity markets rather than on other financial markets. The differences in the underlying commodity markets lead to differences in the

[295] Ministère de l'économie, de l'industrie et de l'emploi

derivatives markets that are built on them. Currently, insider dealing and market manipulation rules draw on the rules that govern the underlying commodity markets. The preferred options ensure that the same disclosure standards apply to all commodity derivatives markets and that all cross-instrument manipulative strategies are fully in scope, and thereby offer a level playing field to investors. In terms of costs, hedging may become more expensive for producers, and supervisors will need to invest in additional data processing and monitoring tools.

Option 5.2.4, the power to request information from spot market participants, is notably important for markets where such requests cannot be done through a sectoral supervisor. 5.2.4 is thereby complementary to option 5.2.5 (strengthening international cooperation between spot and derivative market supervisors). Even in markets where a sectoral supervisor is active, the power to request the necessary information directly may be more efficient in certain cases.

The extension of the prohibition against market manipulation laid down in 5.2.7 would not be effective without 5.2.4 and 5.2.5. The latter are necessary tools in order for competent authorities to be able to detect and sanction the offences defined under 5.2.7.

Option 5.2.3 requires disclosure from those active in the derivatives market. Other market participants will not be covered by this obligation. In terms of benefits, it will be clear to investors which information they may expect to receive, and how they are to conduct themselves in the derivatives markets. This package achieves this without extending financial regulation to underlying commodity markets, the costs of which would clearly outweigh the benefits.

In light of the above, the preferred option is a combination of options 5.2.3, 5.2.4, 5.2.5, and 5.2.7.

8.1.3. Policy options to clarify and enhance regulatory powers

8.1.3.1. Option 5.3.1 - No EU action

Under this option, the existing regimes on market abuse will continue to exist. This is expected to result in the continuation of divergent powers of competent authorities across Member States. As a result, potential market abuse will remain undetected as suspicious OTC transactions will not be reported and some competent authorities will continue to lack powers to access telephone data records of telecom operators necessary to provide evidence when they suspect specific market abuse. Furthermore, some competent authorities will not have the possibility to enter private premises and will be deprived from providing important evidence when they suspect market abuse. In addition, competent authorities will have difficulties to prove market abuse when they discover attempts of market manipulation which did not lead to benefits for the offender.

8.1.3.2. Option 5.3.2 – Introduce reporting of suspicious orders and suspicious OTC transactions

Under this option banks and investment firms would be required to report suspicious orders and suspicious OTC transactions. For orders this would impact all market

participants and for OTC transactions this would affect market participants in 11 Member states who currently do not require to report these transactions.

This option is expected to contribute to the objective of increase market integrity by further facilitating the detection of market abuse through reporting of suspicious orders and suspicious OTC transactions to the competent authorities. As this will improve the possibility to investigate and detect potential market abuse and where necessary impose sanctions, this policy option is highly effective in contributing to the objective of deterrent sanctions.

This option is considered efficient as to a large extent, market participants already today monitor both orders and OTC transactions for their own purposes and this would require limited modification of internal systems in place. Therefore, the cost of reporting these transactions is considered proportionate; ensuring that market abuse can be detected and sanctioned.

Generally, respondents to the public consultation supported an extension of the suspicious transaction reporting regime to include orders and OTC transactions (over three quarters of respondents who expressed an opinion supported the extension). Regulators and member states were strongly in favour of an extension, and while most other respondents also supported the extension, a number raised potential issues as to the increased costs and its practical implementation (although no specific details of costs were presented).

Assessment of fundamental rights

This option entails an interference with the right to private life (Art.7); protection of personal data (Art 8); and freedom to conduct a business (Art.16) of the Charter of Fundamental Rights.

This option provides for the limitation on these rights to be provided for by law, respects the essence of those rights, and is necessary to meet objectives of general interest recognised by the Union and the need to protect the rights and freedoms of others, in accordance with article 52 of the Charter of Fundamental Rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property (article 17 of CFR). Reporting of suspicious orders and OTC transactions is necessary to ensure that competent authorities can detect and sanction market abuse effectively, and this will contribute to the general interest objective of market integrity. This option is necessary to protect the right to property, as currently investors can suffer losses to their investments due to market manipulation which goes undetected in the absence of reporting of suspicious orders or suspicious OTC transactions. This option is proportionate as the use of this data should be limited to the sole purpose of market abuse investigations by competent authorities and data access should be limited to the time necessary to conduct market abuse investigations.

The Data Protection Directive 95/46/EC requires that personal data which is processed must be accurate, adequate and not excessive in relation to the legitimate purposes for which it is processed. In addition personal data must only be processed for no longer than necessary. A system of reporting suspicious transactions requires

the processing of personal data by sellers and to carry on an assessment of customers for the disclosure of data to third parties who will also process. This processing of personal data will have to comply with national data protection laws implementing Directive 95/46/EC.

8.1.3.3. Option 5.3.3 - prohibit attempts at market manipulations

Under this option, regulators would gain the power to sanction as market abuse attempts to manipulate the market. In essence, even a "failed" attempt to manipulate the market would be subject to sanctions where there is evidence of intent.

This policy option would act as a strong deterrent against engaging in market manipulation. Therefore, ensuring that attempts at market manipulation are prohibited, contributes greatly to achieving the objective of ensuring deterrent sanctions. In addition, this increased power would help regulators in sanctioning attempted market abuse and therefore contributes further to the objective of enhancing market integrity.

The public consultation highlighted that there is broad support from stakeholders for this policy option. Overall, three quarters of those respondents who expressed an opinion on this issue were in favour of the proposed extension of the MAD regime. However, respondents were generally also concerned about the need to improve the clarity of the proposed definition as they felt this needs to be very clear about the elements of the offence and what must be proved. Some respondents questioned how intent would be proven on a practical level. This last point would be an issue notably for criminal sanctions against market abuse.

Therefore, the impact on market participants and investors is expected to be positive as market abuse would be further avoided. This option is also considered beneficial for regulators as it would facilitate the detection of market abuse.

Assessment of fundamental rights

This option interferes with right of freedom of expression and information (Art.8), and the right of freedom to conduct business (Art. 16) of the charter of fundamental rights. More particularly, the risk exists that legitimate market behaviour could be curbed, out of fear of facing investigation/prosecution.

This option provides for the limitation on these rights to be provided for by law, respects the essence of those rights, and is necessary to meet objectives of general interest recognised by the Union and the need to protect the rights and freedoms of others, in accordance with article 52 of the Charter of Fundamental Rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property (article 17 of CFR). Prohibiting attempts at market manipulation is necessary to ensure that competent authorities will be able to sanction attempted market manipulation where they have evidence of intent to commit market manipulation, even in the absence of an identifiable effect on market prices; this will contribute to the general interest objective of market integrity. This option is necessary to protect the right to property, as currently investors can suffer losses due to attempts at market manipulation, where

the intent to manipulate is clear even if the effects on prices of that attempt at manipulation cannot be proven, and therefore the offence cannot be sanctioned.

8.1.3.4. Option 5.3.4 - ensure access to data and telephone records from telecom operators for market abuse investigations

This option would clarify that competent authorities who pursue market abuse are authorised to obtain telephone and data traffic records from telecommunications providers when they have a reasonable suspicion of insider dealing or market manipulation. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data from telecom operators in accordance with necessity and proportionality requirements would be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

This option is expected to contribute to the objective of market integrity by ensuring that market abuse can be detected, by enabling competent authorities to access data and telephone records from telecom operators when they suspect market abuse. Access to telephone and data traffic records held by telecom operators can be sometimes the sole piece of evidence to establish whether inside information has been transferred from a primary insider to someone trading with this inside information. For example, this data would represent the only piece of evidence in a case where a board member of a company in possession of inside information transfers inside information by phone to a friend, relative or family member who afterwards executes a suspicious transaction based on the inside information received. The telephone traffic records from telecom operators could be used by the regulator to demonstrate that a call had been placed by the primary insider to their friend or relative shortly before that person then called their broker to instruct them to make a suspicious transaction. The traffic records from telecom operators would provide evidence of a link which could be used as evidence to sanction the case which otherwise would never be detected. As a result, this policy option improves the detection of market abuse which is a pre-condition to impose sanctions. Therefore this option is equally effective in contributing to the objective of deterrent sanctions.

Responses to the public consultation from regulators and member states generally differed from those of industry participants. Several public authorities welcomed this option in their responses to the consultation or noted that they already used this power and welcomed this clarification on the grounds that the data was vital for identifying and confirming market abuse cases[296]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers.

Assessment of fundamental rights

[296] Joint FSA/HM Treasury Response (UK), Ministry of Finance of the Czech Republic, CNMV (Spain), Ministère de l'économie, de l'industrie et de l'emploi

This option entails an interference with fundamental rights, more particularly: respect for private and family life (Art. 7) and protection of personal data (Art. 8) of the Charter of fundamental rights.

This option provides for the limitation on these rights to be provided for by law, respects the essence of those rights, and is necessary to meet objectives of general interest recognised by the Union and the need to protect the rights and freedoms of others, in accordance with article 52 of the Charter of Fundamental Rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property (article 17 of CFR).

This option is necessary to provide evidence and investigative leads on the possible possession of insider information or market manipulation, and will therefore facilitate the detection and sanctioning of market abuses. As a result, currently undetected abuses will be detected and sanctioned, ensuring market integrity and more equal treatment of authors of violations. This option is necessary to protect the right to property, as market abuses that go unsanctioned because competent authorities cannot access this data to obtain evidence lead to investor losses.

It is proportionate as data from telecom operators should be only provided based on the safeguard of the existence of a reasonable suspicon of insider dealing or market manipulation. This ensures that data retained are provided only to the competent national authorities responsible for market abuse investigations, in specific cases when there are reasonable grounds for suspecting market abuse and in accordance with national law. In addition, the data should be limited to what is strictly necessary to perform the investigation and only use for the purpose of market abuse investigation. When the investigation is closed without further action, the data from telecom operators should be deleted. Furthermore, the procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements would be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

8.1.3.5. Option 5.3.5 - ensure access to private premises to seize documents for market abuse investigations

Under this option, competent authorities who suspect market abuse would be able to enter private premises and seize documents where the person to whom a demand for information has already been made fails (wholly or in part) to comply with it; or; (ii) where there are reasonable grounds for believing that if a demand were to be made, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed. This would be subject to permission from a judge.

The possibility to detect market abuse is an important factor in the deterrent effect of sanctions. Therefore, as this option will ensure that competent authorities are in a position to gather evidence necessary to detect market abuse which otherwise would remain undetected and unsanctioned, it contributes significantly to meeting the objective of increasing the deterrent effect of sanctions.

It should be noted also that this option ensures a balance between the protection of fundamental freedoms and the detection and sanctioning of market abuse by introducing safeguards: by enabling authorities to gain access to premises or documents when it is necessary under the above-mentioned conditions, and subject to approval by an independent party (a judge). The competent authority would then need to demonstrate to a judge that the conditions for the request were met and would need to obtain a warrant from a judge to enter private premises and seize documents.

As stated above, responses to the public consultation from regulators and member states generally differed from those of industry participants. Few respondents addressed this issue specifically but some respondents stated that public authorities in their Member State already had such a power and supported clarifying that all should have it[297]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers.

Assessment of fundamental rights

The following fundamental rights of the Charter of Fundamental Rights are of particular relevance: respect for private and family life (Art. 7), protection of personal data (Art. 8); freedom to conduct business (Art. 16).

This option provides for the limitation on these rights to be provided for by law, respects the essence of those rights, and is necessary to meet objectives of general interest recognised by the Union and the need to protect the rights and freedoms of others, in accordance with article 52 of the Charter of Fundamental Rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property (article 17 of CFR).

More specifically, access to premises is necessary to ensure better detection of market abuse and ensure the general interest objective of ensuring market integrity is met. This option is necessary to protect the right to property, as market abuses that go unsanctioned because competent authorities cannot access private premises to obtain evidence of market abuse lead to investor losses.

In addition the option includes safeguards that ensure proportionality, as this power will be exercised by competent authorities only when it is necessary and in relation to the breach, with the permission of a judge, thereby ensuring that fundamental rights remain protected. Safeguards should ensure that access to premises to seize documents is only granted in cases where there are reasonable grounds to suspect that market abuse has occurred and there are reasonable grounds for believing that if a demand for access were to be made, it would not be complied with, or that the documents or information to which the request relates, would be removed, tampered with or destroyed. If the data obtained of such an investigation would lead to no further action, these data should be deleted by the competent authorities.

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[297] Joint FSA/HM Treasury response (UK), Central Chamber of Commerce of Finland, Athens Exchange

In this context, attention should be paid to the decision of the EUCHR of 21.12.2010 (Primagaz v. France (no. 29613/08), Société Canal Plus and Others v. France (no. 29408/08) concerning the searches of their premises by competition authorities, in which the applicants were suspected of anti-competitive practices, and where various documents and data media were seized. The Court has found that the conditions applicable to this search were in breach of articles 6, of the European Convention of Human Rights namely because there was no effective judicial review of the lawfulness and well-foundedness of the search and seizure orders. The national legal measures must also provide for appropriate redress in case of unlawful search and seizure.

8.1.3.6. Option 5.3.6 - grant protection and incentives to whistleblowers

This policy option would seek to enhance the market abuse framework and could include the following specific whistle blowing requirements: appropriate protection for whistleblowers reporting suspected market abuse; a provision for providing financial incentives for persons who provide a competent authority with salient information (that leads to a monetary sanction); and enhancements of Member States' provisions for receiving and reviewing whistle blowing notifications.

Although some Member States have in place specific systems to protect whistle blowers against reprisals[298] such systems are usually horizontal rules (relating to, for example, labour law), and therefore are not specific to the financial services area, whilst some member states have no specific provision at all. This option would entail that appropriate employment protection would be provided for within the market abuse framework and would seek to ensure whistle blowers not discriminated against. Persons who report violations to the competent authorities could receive financial incentives which would be determined as a percentage of the fine issued by the competent authority, and would be granted for information which was genuinely new and resulted in a sanction. The framework would include a provision for competent authorities to include clear reporting mechanisms (for example telephone numbers or email boxes) as well as published guidance (for example a web page outlining the protection available to whistle blowers, and the competent authorities' procedures for handling the information).

This option has several advantages: it will encourage employees and market participants to alert competent authorities to suspected cases of market abuse, provide very strong incentives for those who would not normally report cases of suspected market abuse to do so, and increase the ease with which cases can be reported. All of these factors will increase the market intelligence available to competent authorities and assist in the investigation of market abuse cases. Increasing the number of cases reported to regulators means that this proposal significantly contributes to meeting both the specific objective of increasing the availability of information available to regulators and to the general objective of increased market integrity. By protecting those who attempt to help the authorities

[298] For example see the Public Interest Disclosure Act 1998 (PIDA) in the UK which protects employment rights for individuals who "blow the whistle", e.g. from and employer not offering a promotion or other opportunities they would have otherwise offered.

financially rewarding those who may struggle to find employment after blowing the whistle, this option will provide appropriate social protection to such individuals.

This option could have the disadvantage of leading to an increase in false submissions by persons seeking financial advantage. However this risk could be mitigated and the quality of submissions ensured by appropriate procedures to ensure competent authorities are able to verify the status/identity of the whistle blower. Further, it may be appropriate to set a minimum level of monetary sanction for which a whistle blower would receive financial incentives. This would ensure competent authorities were able to appropriately focus resources on the most significant cases.

There is also a risk that such a provision could discourage individuals from reporting concerns internally, and so reduce the effectiveness of a company's existing compliance, legal, and audit functions. This risk can be mitigated by requiring individuals to report any concern internally first (where appropriate and available), whilst still providing for financial rewards.

This option was not included in the public consultation, but one respondent stated that a systematic approach to protected whistle-blowing could play an important role in ensuring stable and well-functioning financial markets in general[299].

Assessment of fundamental rights

The following fundamental rights of the Charter of Fundamental Rights are of particular relevance: respect for private and family life (Art. 7), protection of personal data (Art. 8) and presumption of innocence and right of defence (Art 48).

The option provides for limitation of these rights in law while respecting the essence of these rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect the fundamental right to property (article 17 of CFR). The option meets these objectives by facilitating the detection of market abuses which would otherwise not be reported to the authorities, resulting in abuses going undetected and unsanctioned, to the detriment of market integrity and leading to investor losses.

The proposed measure is proportionate as it will ensure protection of whistle blowers, including the protection of private and personal data. In addition, the personal and private data of suspects under investigation of market abuse as a result of whistle blowing should be protected by the competent authorities. If the investigation fails to detect market abuse, the data provided by the whistle blower should be deleted by the competent authorities. To this end, competent authorities should assess if there are reasonable grounds to suspect market abuse.

In addition, whistle blowing activity should preserve particularly article 48 of the charter of fundamental rights regarding the "presumption of innocence and right of defence". While the whistle blowing activity will contribute to the detection of market abuse, competent authorities should assess if there are reasonable grounds to

[299] Response by UNI-Europa Finance

suspect market abuse, based on the presumption of innocence and right of defence when they pursue their investigations.

Incentives for whistle blowers should be proportionate and only be granted in case where the investigation has lead to the effective detection and sanctioning of market abuse.

In this context it is important that the implementation of whistle blowing schemes, comply with data protection principles and criteria indicated by the data protection authorities[300].

8.1.3.7. The preferred options

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.3.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.3.2 (introduce reporting of suspicious orders and suspicious OTC transactions)	*(++) investors: benefit from increased market integrity due to further reduction of market abuse* *(++) regulators: improved possibility to detect market abuse by availability of suspicious orders and OTC transactions*	*(++)contributes to the objective of dissuasive sanctions by improving detection of market abuse based on orders and suspicious OTC transactions*	*(+) adaptation of internal monitoring systems are proportionate and therefore reporting is an efficient tool to detect market abuse .*
	Impact on fundamental rights *Option interferes with rights in Articles 7, 8, 16 of Charter of Fundamental Rights (CFR). Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by facilitating detection of market abuse) and to protect fundamental right to property (article 17 of Charter). It is proportionate as it limits access to transaction data to competent authorities for a time-limited period for the sole purpose of market abuse investigations to ensure market integrity. Access would have to be in compliance with data protection law.*		
Option 5.3.3 (prohibit attempts at market manipulations)	*(++) investors: benefit from increased market integrity due to further reduction of market abuse* *(++) regulators: gain wider scope to sanction abuses by new offence of attempted market manipulation*	*(++) contributes to the objective of dissuasive sanctions by extending powers to sanctions attempts to market manipulation* *(++) overall contribution to the general objective of market integrity*	*(++) facilitates sanctioning of market abuse by competent authorities, who can sanction attempts*

300 Article 29 working party Opinion 1/2006 on the application of EU data protection rules to internal whistle blowing schemes in the fields of accounting, internal controls, auditing matters, fight against bribery, banking and financial crime, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf

	Impact on fundamental rights: *Option interferes with Articles 8 and 16 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by permitting sanctioning of attempted market manipulation where proven) and to protect fundamental right to property (article 17 of CFR). It is proportionate as it would be limited to cases where intent to manipulate can be proven even in the absence of an effect on market prices.*		
Option 5.3.4 (ensure access to telephone and data traffic records from telecom operators for market abuse investigations)	*(++) regulators are enabled to more easily establish and sanction market abuse by access to telephone and data traffic records in cases of a reasonable suspicion of insider dealing or market manipulation* *(++) investors: indirect benefit from increased market integrity* *(++) market participants: benefit from increase market integrity due to more easy detection of market abuse.*	*(++) contribution to the objective of dissuasive sanctions by increasing possibility to detect market abuse* *(++) contribution to the general objective of market integrity*	*(+) facilitates the detection of market abuse by enabling collection of evidence.*
	Impact on fundamental rights: *Option interferes with Articles 7 and 8 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as it is based on the safeguard of data only being provided to competent authorities in specific cases where a reasonable suspicion of insider dealing or market manipulation exists. Further, data should be limited to what is strictly necessary for the investigation, should only used for that purpose and should be deleted when the investigation is closed without further action.*		
Option 5.3.5 ensure access to private premises to seize documents for MA investigations	*(++) regulators are enabled to more easily detect market abuse by enabling access in specific cases when suspecting market abuse* *(++) investors: indirect benefit from increased market integrity* *(++) market participants: benefit from increase market integrity due to improved detection of market abuse.*	*(+) contribution to the objective of dissuasive sanctions by increasing possibility to detect market abuse* *(+) contribution to the general objective of market integrity*	*(+) facilitates detection of market abuse by enabling collection " on-site" of evidence.*

	Impact on fundamental rights: *Option interferes with Articles 7, 8 and 16 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights.* *Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it is based on the safeguards of permission from a judge and access being granted to competent authorities only when there are reasonable grounds for suspecting market abuse, and that without such access a strong risk exists that evidence would be removed, tampered with or destroyed.*		
Option 5.3.6 (grant protection and incentives to whistleblowers)	*(++) increases protection available to individuals reporting market abuse.* *(+) provides regulators with primary information and assistance in market abuse cases.* *(+) increases the accessibility of regulators.*	*(++) enhances the information available to regulators.* *(+) acts as a deterrent against potential market abuse.* *(+) ensures legal clarity for the protection of whistle blowers.*	*(+) highly efficient due to limited associated costs*
	Impact on fundamental rights: *Option interferes with Articles 7, 8 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by improving detection of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it will ensure the protection of whistle blowers, including of their personal data, and in considering information from whistle blowers competent authorities should assess if there are reasonable grounds to suspect market abuse, based on the presumption of innocence and right of defence.*		

Generally, respondents to the public consultation supported an extension of the suspicious transaction reporting regime to include orders and OTC transactions (over three quarters of respondents who expressed an opinion supported the extension). Regulators and member states were strongly in favour of an extension, and while most other respondents also supported the extension, a number raised potential issues as to the increased costs and its practical implementation (although no specific details of costs were presented).

The public consultation highlighted that there is broad support from stakeholders for the option of prohibiting attempts at market manipulation. Overall, three quarters of those respondents who expressed an opinion on this issue were in favour of the proposed extension of the MAD regime. However, respondents were generally also concerned about the need to improve the clarity of the proposed definition as they

felt this needs to be very clear about the elements of the offence and what must be proved. Some respondents questioned how intent would be proven on a practical level.

On option 5.3.4, responses to the public consultation from regulators and member states generally differed from those of industry participants. Several public authorities welcomed this option in their responses to the consultation or noted that they already used this power and welcomed this clarification on the grounds that the data was vital for identifying and confirming market abuse cases[301]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers.

Few respondents addressed option 5.3.5 specifically but some respondents stated that public authorities in their Member State already had such a power and supported clarifying that all should have it[302]. Industry respondents mainly responded that competent authorities should make better use of existing information they receive and apply fully their current powers. Option 5.3.6 was not included in the public consultation, but one respondent stated that a systematic approach to protected whistle-blowing could play an important role in ensuring stable and well-functioning financial markets in general[303].

Based on the analysis in the table above, options 5.3.2, 5.3.3, 5.3.4, 5.3.5 and 5.3.6 receive the highest score. These options are compatible with each other and could be combined.

Options 5.3.2 and 5.3.6 usefully complement each other in providing additional sources of information for regulators about possible market abuse; currently regulators do not receive information about suspicious unexecuted orders and suspicious OTC transactions, nor do they all receive information from whistle blowers. Combining these options will therefore make it easier than at present for regulators to detect possible market abuse with a view to sanctioning it. Options 5.3.4 and 5.3.5 will ensure that when they have reasonable grounds to suspect market abuse, competent authorities have access to telephone data records from telecom operators and can enter private premises in order to obtain evidence to sanction market abuse. Finally, by including the prohibition of attempts at market manipulation (option 5.3.3) in the package of preferred options, regulators will be able to sanction such attempts when they have evidence of intent, even in the absence of a clear effect on prices. This will reduce further the scope for manipulative behaviour to remain unsanctioned and will thereby promote market integrity and investor protection.

The powers outlined in the above-mentioned options are necessary to meet the general interest objective of ensuring greater market integrity, by making it easier for regulators to prove and sanction market abuse, but are proportionate as they are subject to appropriate safeguards (notably the existence of a reasonable suspicion of

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301 Joint FSA/HM Treasury Response (UK), Ministry of Finance of the Czech Republic, CNMV (Spain), Ministère de l'économie, de l'industrie et de l'emploi

302 Joint FSA/HM Treasury response (UK), Central Chamber of Commerce of Finland, Athens Exchange

303 Response by UNI-Europa Finance

insider dealing or market manipulation for options 5.3.4 and 5.3.5 and permission from a judge for option 5.3.5). A detailed analysis of their impact on fundamental rights can be found in annex 8.

There are synergies between these options and those outlined in section 6.1.1. As already mentioned, option 5.1.8 will strengthen further the capacity of regulators to detect market abuse by ensuring that operators of MTFs and OTFs adopt structural provisions to detect market abuse on their facilities, enabling them to report any suspected breaches to the regulator. Option 5.1.7 will ease enforcement by ensuring regulators have clarity on which specific strategies relating to automated or high frequency trading are in breach of the prohibition of market abuse. Option 5.2.5 will also facilitate the enforcement task of financial regulators by promoting good international cooperation with physical commodity market regulators, thereby making the detection of cross-border and cross-market abuse easier. There is also a natural complementarity with the options assessed in the ensuing section (6.1.2.2), because the market abuse powers of a regulator can only be effective if abuses are not only detected, but can also be sanctioned in an effective, consistent and dissuasive manner.

In light of this analysis, the preferred option is a combination of options 5.3.2, 5.3.3, 5.3.4, 5.3.5 and 5.3.6.

8.1.4. *Policy options to introduce common principles for sanctions*

8.1.4.1. *Option 5.4.1 - No EU Action*

Under this option, the existing regimes on market abuse will continue to exist. This is expected to result in the continuing divergent application of sanctions across Member States. Therefore, similar market abuses will not be sanctioned to the same extent. As a result, in some specific cases of market abuse, sanctions might not be sufficiently dissuasive which could provide an incitement to commit market abuse. This situation could also lead to regulatory arbitrage as offenders can increasingly act cross-border due to the further integration of financial markets. When the European supervisory framework takes effect in 2011, ESMA is expected to conduct a peer review analysis of the sanctioning process and Member States will start to disclose their published sanctions to ESMA.

8.1.4.2. *Option 5.4.2 - minimum rules for administrative measures and sanctions*

This option is aims to reinforce an effective sanctioning regime in line with the Commission Communication reinforcing sanctions in the financial sector.[304] To this end, this option determines common rules on the types of administrative sanctions and measures available to competent authorities. In addition, common minimum rules could be introduced to ensure that administrative fines are effective, proportionate and dissuasive, ensuring disgorgement of profits. This could include the formulation of minimum and maximum levels of administrative fines that can be imposed for the most important market abuses (insider dealing and market

[304] COM (716) 2010 "Reinforcing sanctioning regimes in the financial services sector", available at: http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/COM_2010_0716_en.pdf

manipulation). However, these amendments should not prevent individual Member States from fixing even higher levels than the common standards. In addition, when actual fines are determined, competent authorities could take into account aggravating or mitigating factors, such as the benefits or incurred losses of an offence and good cooperation with the regulator or financial hardship.

This option would contribute to the objective of improving the deterrent effect of administrative sanctions. Minimum rules would ensure that administrative sanctions are higher than the potential profits from market abuse and would ensure disgorgement of profits. In addition, they would contribute to the objective of improving legal certainty, as the types and levels of administrative sanctions would be based on common minimum rules. As a result, similar offences would be sanctioned based on the same common minimum rules, which would reduce the risks of regulatory arbitrage and contribute to the creation of a level playing field for all market participants.

As pointed out in the public consultation, all industry participants will be treated more equally as similar market abuses will be sanctioned in a more consistent way across Member States reducing risks of regulatory arbitrage[305]. This will contribute to investor protection as more coherent administrative sanctions will ensure improved deterrence, thereby avoiding potential market abuse.

Respondents to the consultation generally supported harmonisation of sanctions at the EU level as a means to increase their deterrent effect. There was support for harmonisation of administrative sanctions at the EU level, with respondents noting that at present sanctions differed greatly between Member States and that Member States should enforce and apply MAD in a more consistent and harmonised way, with a view to reducing regulatory arbitrage. However there was also some potential uncertainty as to the practicality of complete harmonisation, especially due to the differences in markets between Member States.

In relation to the setting of minimum levels for financial penalties, there was a general consensus supporting minimum levels but some concerns about the practical implications were raised by some respondents.

Assessment of fundamental rights

For this policy option the following fundamental rights[306] are of particular relevance: Title VI Justice, particularly the right to an effective remedy and fair trial (Art. 47), presumption of innocence and right of defence (Art 48).

This option provides for limitation of these rights in law while respecting the essence of these rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect fundamental right to property (article 17 of CFR). In particular, introducing common minimum rules for administrative measures and sanctions will improve the coherent application of sanctions within the EU which is necessary to ensure that comparable offences of

305 Responses to the public consultation on the MAD from June 2010.
306 EU Charter of fundamental rights,

market abuse are sanctioned with comparable administrative sanctions and measures. An increased deterrent effect of sanctions could be expected to result in greater market integrity and a reduction in the losses suffered by investors due to market abuse.

This option is proportionate as it will ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the legislation. As the rules under this option will introduce minimum rules for administrative measures and sanctions, they will contribute to the "right to an effective remedy and to a fair trial" (Article 47 of the charter of fundamental rights). In addition, the principle of innocence and right of defence (Article 48) will be preserved. In view of the above, this policy option is considered in compliance with the charter of fundamental rights.

8.1.4.3. Option 5.4.3 - uniform administrative measures and sanctions

Under this option both the types of administrative sanctions available to competent authorities as well as the minimum and maximum levels for each type of administrative sanction would be determined, and Member States would not be able to exceed the maximum levels foreseen. In addition, mandatory criteria would be determined to take into account aggravating or mitigating actors when establishing actual administrative fines and Member States would not be able to take into account additional criteria. Overall, this option would imply that administrative sanction regimes are fully harmonised and that any infringement would be subject to the same type and level of sanction across all Member States.

This option is expected to be effective in achieving the objective of dissuasive administrative sanctions as the minimum and maximum level of sanctions will be equal across all Member States. However, in some Member States[307] which currently have a very high level of sanctions or an unlimited maximum level for administrative sanctions, this might lead to a reduction in the maximum level of administrative sanctions and reduce deterrence if the actual level established would be lower then what is currently in place. In addition, this option will contribute to achieving a level playing field between all actors as market abuse is expected to be sanctioned administratively in a consistent way across the EU based on the same maximum and minimum levels and same criteria, reducing risks of regulatory arbitrage. As a result the objective of legal certainty would also be achieved. Furthermore, fully harmonised sanctions would contribute to the same level of investor protection across all Member States.

While this option is highly effective in achieving the policy objectives of deterrence, it is not sure that this option is efficient as market situations, legal systems and traditions differ among Member States. This has been pointed out by multiple stakeholders in the public consultation on the market abuse directive as described in Annex 3 who consider that sanctions should allow for sufficient flexibility as market situations differ considerably among Member States. Therefore, to have exactly the same types and levels of sanctions might not be reasonable and proportionate to ensure deterrent sanctions. However as financial markets are increasingly integrating,

[307] UK, IT

having more convergent sanctioning regimes ensure a future-proof legal framework. Therefore this option is considered less efficient then introducing minimum rules for administrative sanctions.

Respondents to the consultation generally supported harmonisation of sanctions at the EU level as a means to increase their deterrent effect. There was support for harmonisation of administrative sanctions at the EU level, with respondents noting that at present sanctions differed greatly between Member States and that Member States should enforce and apply MAD in a more consistent and harmonised way, with a view to reducing regulatory arbitrage. However there was also some potential uncertainty as to the practicality of complete harmonisation, especially due to the differences in markets between Member States.

In relation to the setting of minimum levels for financial penalties, there was a general consensus supporting minimum levels but some concerns about the practical implications were raised by some respondents.

Assessment of fundamental rights

For this policy option the following fundamental rights[308] are of particular relevance: Title VI Justice, particularly the right to an effective remedy and fair trial (Art. 47), presumption of innocence and right of defence (Art 48).

This option provides for limitation of these rights in law while respecting the essence of these rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect the fundamental right to property (article 17 of CFR). In particular, introducing uniform rules for administrative measures and sanctions will ensure the coherent application of sanctions within the EU, which is necessary to ensure that comparable offences of market abuse are sanctioned with comparable administrative sanctions and measures. An increased deterrent effect of sanctions could be expected to result in greater market integrity and a reduction in the losses suffered by investors due to market abuse.

It is proportionate it would ensure that the same offence of market abuse would be subject to the same type and level of administrative sanction across the EU. These uniform rules will particularly ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence across all Member States. This option will contribute to "right to an effective remedy and to a fair trial" (Article 47 of the charter of fundamental rights) as rules will be uniform across all Member States and the principle of innocence and right of defence (Article 48) will be preserved. In light of the above, this policy option is considered in compliance with the charter of fundamental rights.

8.1.4.4. Option 5.4.4 - requirement for criminal sanctions

Under this option, which builds on the Communication Reinforcing sanction regimes in the financial sectors[309], Member States will be required to provide for effective,

[308] EU Charter of fundamental rights,

proportionate and dissuasive criminal sanctions for the most serious insider dealing and market manipulation offences as defined at EU level. As pointed out in table 1 above, only a limited number of Member States would need to amend their national legislation. For example, 2 Member States would need to introduce criminal sanctions for market manipulation and 1 Member State for insider dealing[310] .

In the case of market abuse, criminal sanctions are particularly applied in the more important market abuse cases.[311] For such cases, criminal sanctions and in particular custodial sentences are considered by some national regulators to have a strong deterrent effect on potential abuse, greater than that of administrative sanctions[312]. There are three main reasons for this. First, making the most serious market abuse offences criminal offences sets clear boundaries in law that certain behaviours are regarded as unacceptable and sends a message to the public that these are taken very seriously by society; this could be expected to lead to changes in behaviour[313]. Second, successfully prosecuting market abuse offences under criminal law often results in extensive media coverage which helps to deter potential defenders and has an important demonstration effect, as it shows that the competent authorities are serious about tackling market abuse[314]. Third, there is evidence from published studies that criminal sanctions contribute strongly to the objective of increasing deterrence due to the stigma attached to criminal conduct[315], and evidence from one survey of companies suggests that criminalisation and in particular incarceration are considered to be the strongest possible deterrent[316].

309 COM (716) 2010 "Reinforcing sanctioning regimes in the financial services sector", available at: http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/COM_2010_0716_en.pdf

310 Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.cesr-eu.org.

311 Executive summary to the CESR report on administrative measures and sanctions as well as criminal sanctions available in Member States under the Market Abuse Directive (MAD), p 2, ref CESR/08-099 available at www.cesr-eu.org

312 For example, in a speech to the FSA's Enforcement Conference on 18 June 2008, the UK FSA Director of Enforcement Margaret Cole said: "We feel that the threat of civil fines hasn't worked as well as we would have liked. We're convinced that the threat of a custodial sentence is a much more significant deterrent. The good news is that in this area stakeholders and commentators all seem to agree with us." http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0618_mc.shtml

313 See speech by Margaret Cole, FSA Director of Enforcement, on 18 June 2008 referenced above.

314 Margaret Cole, speaking at the FSA Annual Financial Crime Conference on 27 April 2009, said referring to a specific criminal conviction secured by the FSA that year: "The McQuoid/ Melbourne conviction resulted in considerable publicity, including a front page spread in the Independent under the headline 'Net tightens on insider trading'. By raising the profile of insider dealing, by making it known that cheats will be punished, we are able to send a strong message." http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0427_mc.shtml

315 Michael Levi, *Suite justice or sweet charity? Some explorations of shaming and incapacitating business fraudsters,* Vol. 4 No. 2, Sage Publications, 2001, pp. 147-162. Levi argues that criminal law is effective as it embodies a comprehensive enforcement mechanism and has a deterrent effect due to the stigma that is attached to criminal conduct.

316 Report for the Office of Fair Trading (UK)*, An assessment of discretionary penalties regimes*, London Economics, October 2009. In a survey by the OFT, companies ranked criminal penalties first in motivating compliance with the law (p. 24). The report argues that "criminalisation and other forms of personal sanctions are important added elements to the deterrent power of corporate fines and (particularly incarceration) are arguably the strongest possible deterrent for a potential infringer" (p. 9).

The introduction of common definitions of the most serious market abuse offences and a requirement for Member States to put in place criminal sanctions is expected to contribute to a more effective investigation and prosecution of such crimes by offering a new tool to address market abuse. This would complement administrative measures and sanctions. The EU wide availability of criminal sanctions improves deterrence and provides for a level playing field, and therefore, will lead to improved financial market integrityFinally, there is evidence that effective enforcement of market abuse legislation, and in particular enforcement through criminal sanctions, reduces the cost of equity[317] (to the benefit of investors) and contributes to improved market integrity[318].

There was limited specific discussion of harmonisation of criminal sanctions in the responses to the public consultation. Two respondents felt that penal measures should be left to member States[319], while others noted the difficulties of implementing regimes in criminal law. One respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another[320].

There was a mixed response to the option of harmonising criminal sanctions in financial services legislation in general outlined in the responses to the Communication on reinforcing sanctioning regimes in the financial services sector. On the one hand some public authorities[321] and industry or union groups[322], as well as some individual and institutional investor groups[323], were favourable to, or not against, harmonisation of criminal sanctions in the financial services sector. On the other hand, other public authorities[324], industry and institutional investor representatives[325] or others[326] were opposed to, or sceptical of, harmonisation of

317 Utpal Bhattacharya and Hazem Daouk, *The World Price of Insider Trading*, Journal of Finance, February 2002, p. 25, concludes that although the introduction of insider trading laws in itself is not associated with a reduction in the cost of equity "the difficult part - the enforcement of insider trading laws - is associated with a reduction in the cost of equity in a country".

318 See section 3.1.3. Evidence from one Member State (UK), where they have recently reinforced their approach regarding criminal sanctions, shows that this had a positive impact on "market cleanliness".

319 Finnish Ministry of Finance and Central Chamber of Commerce of Finland

320 German Insurance Association (GDV)

321 Central Bank of Ireland (offences to be clearly defined), Danish FSA (but subsidiarity to be addressed) Ministry of Finance Finland (compliance with fundamental rights to be ensured), Estonian Ministry of Finance (but not a priority - EU interference with criminal law in general to be avoided, offences to be clearly defined), Spanish CNMV (offences to be clearly defined).

322 Association Française des marches financiers (offences to be clearly defined in cooperation with ESAs), Nordic Financial Union, British Bankers association (but limited consistency can be achieved due to different approaches in sentencing and standards of proof).

323 Financial Services User Group, Private Client Investment Managers and Stockbrokers (but to be properly targeted and applied carefully).

324 Czech National Bank, Swedish Ministry of Finance, Austrian FSA, Ministry of Finance and National Bank of Slovakia, Ministry of Finance of Czech Republic, ESMA; German Federal Government – not proved that conditions of Article 83(2) TFEU are met.

325 ING Group (to be left to MS, could be only defined violations eligible for criminal sanction); Austrian Federal Economic Chamber (impact on constitutional law); German Insurance association, Legal and General Group; European Association of Public Banks; European federation of Insurance Intermediaries; London Stock Exchange Group (further consultation needed); Unicredit; EUMEDION (institutional investor group), UBS AG (procedural fairness and ne bis in idem to be complied with); Bundesverband Deutscher Banken – not necessary.

criminal sanctions. At the same time, many respondents from public authorities, industry and one investor/user group took the view that criminal sanctions for the most serious offences were appropriate[327], and several banking and institutional investor representatives specifically cited market abuse as being an appropriate sector for criminal sanctions[328]. A smaller number of respondents from public authorities, industry and one consumer organisation argued that administrative sanctions were equally or more effective[329].

Assessment of fundamental rights and compliance with article 83 (2) (TFEU)

For this policy option the following fundamental rights[330] are of relevance: Title VI Justice, the right to an effective remedy and fair trial (Art. 47), presumption of innocence and right of defence (Art 48), the principle of legality and proportionality of criminal offences and penalties (Art 49) is important and right not to be tried or punished twice in criminal proceedings for the same criminal offence (Art 50). Particularly Art. 49 is important.

This option provides for limitation of these rights in law while respecting the essence of these rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect the fundamental right to property (article 17 of CFR). It is proportionate as most Member States already consider that criminal sanctions are necessary and proportionate, and the option is limited to the most serious offences.

In accordance with article 83 (2) of the Treaty (TFEU), the requirement of criminal sanctions for commonly defined serious forms of market abuse of the Member States is considered essential to ensure the effective implementation of the Union policy on ensuring the intergrity of the financial market. In this context, the majority of Member States have introduced criminal sanctions in national law to address market abuse. Common minimum rules on definitions for the most serious market abuse

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326 Linklaters (may be an obstacle to consistent application of EU law) IMF (may create problems in cooperation between authorities).

327 Central Bank of Ireland, Danish FSA (for both legal and natural persons), Romanian National Securities Commission, Association for Financial Markets in Europe (AFME – to be avoided application of both criminal and administrative); Swedish Ministry of Finance (only as a last resort + relationship with administrative sanctions and cooperation issues to be reflected); Association Française des marches financiers; FSUG (but right to claim damages to be dissociated from the result of criminal proceedings), UBS AG (useful only against individuals); Nordic Financial Union (but financial institution to be punished instead of individuals if it benefits from the violation); Centre d'étude et de perspective stratégique (against management, more efficient than fines imposed to financial institutions); Association of Private Client Investment Managers and Stockbrokers; IMF; Estonian Ministry of Finance; CNMV (but some disadvantages: longer procedures, role of supervisors limited).

328 Association of banking insurers (e.g. for market abuses); Deutsche Bank (only in some areas e.g. market abuse); AXA Investment managers (but only where some degree of fraud is involved, e.g. market abuses, misuse of client assets).

329 ING Group, Austrian FSA, CFA Institute (civil proceeding to be preferred because faster and reduce burden of proof), European Association of Public Banks, law professor, Unicredit, Federation of German consumer organisation - VzBv (potential problems of criminal sanctions linked to lack of expertise of prosecutors, long proceedings and low priority given by Courts), ESMA (disadvantages of criminal sanctions: longer, resource consuming proceedings, lack of harmonised rules on cooperation, possible increased divergence in enforcement), Italian Banking Association.

330 EU Charter of fundamental rights,

offences would facilitate the cooperation of law enforcement authorities in the EU. Criminal sanctions show a particularly strong disapproval of society for certain forms of behaviour[331]. The entering of convictions in criminal records can have a particular deterrent character**.** Successfully prosecuting market abuse offences under criminal law often results in extensive media coverage, which helps to deter potential defenders and has an important demonstration effect, as it shows that the competent authorities are serious about tackling market abuse. The increased deterrent effect of criminal sanctions for the most serious offences could be expected to result in greater market integrity and a reduction in the losses suffered by investors due to market abuse.

The absence of criminal sanctions in some Member States entails the risk that serious market abuses such as market manipulation and insider dealing remain unsanctioned, or insufficiently sanctioned, within the EU.

8.1.4.5. Option 5.4.5 - minimum rules for criminal sanctions

Under this option, Member States would be required to introduce criminal sanctions for market abuse offence and also minimum rules for the types and levels for related criminal sanctions would be established. These minimum rules could also include minimum and maximum levels for imprisonment and fines for the most important market abuses, e.g. insider dealing and market manipulation.

In those countries which do not yet have criminal sanctions in place, the introduction of criminal sanctions is expected to contribute to more effective prosecution of market abuse offences by offering a new tool to address market abuse. In addition, in those Member States who have already criminal sanctions in place, minimum and maximum rules will further approximate the level of sanctions available for market abuse. It is of importance, as financial markets become increasingly integrated. Such EU wide minimum harmonisation contributes to a level playing field between all actors and improving legal certainty.

However, as the legal frameworks and systems for market abuse criminal offences differ widely among Member States at present and the effects of minimum harmonisation concerning the offence definitions and the requirement for criminal sanctions have not been explored yet,, in light of the spirit of Article 83 (2), it seems to be premature to foresee already minimum rules on types and levels of criminal sanctions at this stage. It is preferred to follow a gradual approach, i.e. introduction of a general obligation on MS to provide criminal sanctions for certain well-defined most serious offences and to evaluate the effectiveness of its implementation before going further.

There was limited specific discussion of harmonisation of criminal sanctions in the responses to the public consultation. Two respondents felt that penal measures

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331 For example, in a speech to the FSA's Enforcement Conference on 18 June 2008, the UK FSA Director of Enforcement Margaret Cole said: "We feel that the threat of civil fines hasn't worked as well as we would have liked. We're convinced that the threat of a custodial sentence is a much more significant deterrent. The good news is that in this area stakeholders and commentators all seem to agree with us." http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0618_mc.shtml

should be left to member States[332], while others noted the difficulties of implementing regimes in criminal law. One respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another[333].

Assessment of fundamental rights

This option would ensure that the same offence of market abuse would be subject to the same type and level of criminal sanctions across the EU.

For this policy option the following fundamental rights[334] are of relevance: Title VI Justice, the right to an effective remedy and fair trial (Art. 47), the presumption of innocence and right of defence (Art 48), the principle of legality and proportionality of criminal offences and penalties (Art 49); and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Art 50). Particularly Art. 49 is important.

Limiting these rights is necessary to meet the general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect the fundamental right to property (article 17 of CFR).

In accordance with article 83 (2) of the Treaty (TFEU), the level of harmonisation of criminal sanctions for market abuses of the Member States needs to be essential to ensure the effective implementation of the Union policy on the integrity of the financial markets. At this stage, the introduction of common defitnitions of certain offences and the general obligation of introducing cirminal sanctions attached to them seem to be the right level of harmonisiation of criminal law at EU wide level.

8.1.4.6. Option 5.4.6 - improve enforcement of sanctions

Under this option enforcement of sanctions would be improved by introducing a requirement to publish imposed sanctions and improve cooperation on investigations among Member States, where appropriate in collaboration with ESMA. Disclosure to the public of imposed sanctions would become mandatory, except in certain narrowly defined cases such as where such disclosure would seriously jeopardize the financial market or cause disproportionate damage to the parties involved.

The publication of imposed sanctions is considered by regulators as being of high importance to enhance transparency and maintain confidence in financial markets[335]. Therefore publication of imposed sanctions will contribute to the objective of deterrence and improves market integrity and investor protection. This option will also contribute to the objective of eliminating options and discretions where possible by removing the current discretion Member States have not to require such

332 Finnish Ministry of Finance and Central Chamber of Commerce of Finland
333 German Insurance Association (GDV)
334 EU Charter of fundamental rights,
335 CESR, review panel report MAD, Options and Discretions, 2009, p. 19, reference: CESR/09-1120 available at www.cesr-eu.org

publication. However, already today 19 Member States[336] provide for publication of sanctions and this measure will only have an effect in those Member States with currently no rules in place. In addition, improved cooperation of Member States through ESMA will ensure exchange of best practices in addressing market abuse. This is likely to contribute to the detection and sanctioning of market abuse and is expected to contribute to market integrity.

In relation to public disclosure of sanctions, one respondent felt that this could disproportionately affect trust in capital markets and give misleading signals (and also contravene data protection rules)[337], whilst other respondents supported the measure but noted that there may be occasions when public disclosure may be inappropriate.

Respondents to the consultation were supportive of ESMA having a co-ordination role for enforcement purposes; however there was limited support for any further powers or involvement in specific cases.

8.1.4.7. The preferred options

_	*Impact on stakeholders*	*Effectiveness*	*Efficiency*
Option 5.4.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.4.2 Introduction of minimum rules on administrative measures and sanctions	*(++) all market actors will be assessed based on same standards for sanctions and similar offences will be sanctioned based on same standards* *(++) investors will be better protected against market abuse due to more effective, proportionate and deterrent sanctioning regimes across EU*	*(++) minimum rules of sanctions contribute to deterrence* *(++)level playing field: similar market abuse sanctioned based on the same common standards* *(++) minimum rules reduce regulatory arbitrage*	*(+/0) compliance costs for competent authorities for those Member States which lower level of sanctions in place*
	Impact on fundamental rights: *Option interferes with Articles 47 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as it will ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence and respect the presumption of innocence and right of defence.*		

[336] CESR, review panel report MAD, Options and Discretions, 2009, p. 19, reference: CESR/09-1120 available at www.cesr-eu.org

[337] European Savings Banks Group

Option 5.4.3 – uniform administrative measures and sanctions	*(++) all market actors will be assessed based on same types of sanctions and market abuse will be sanctioned the same way across the EU.* *(++) investors will be better protected against market abuse due to more effective, proportionate and deterrent sanctioning regimes across EU*	*(++) minimum rules of sanctions contribute to deterrence* *(++)level playing field: similar market abuse sanctioned based on the same common standards* *(++) uniform rules reduce regulatory arbitrage*	*(-) distinct market situations and legal traditions*
	Impact on fundamental rights: *Option interferes with Articles 47 and 48 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR).* *It is proportionate as these uniform rules will particularly ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence across all Member States. Therefore, they contribute to "right to an effective remedy and to a fair trial" and the right of innocence and right of defence (Article 48) will be preserved.*		
Option 5.4.4 – requirement for criminal sanctions for market abuse	*(+) regulators gain a tool to sanction market abuse in those MS where this is not yet available* *(+) all market participants will be subject to criminal sanctions for market abuse improving level playing field* *(+)Investors will benefit from greater market integrity due to the additional deterrent effect of criminal sanctions*	*(++) availability of criminal sanctions contribute strong to the objective of deterrence of market abuse* *(+) criminal sanctions contribute to improved investor protection* *(+) improves level playing field by ensuring that in all Member States criminal sanctions will be available*	*(+/0) a limited number of Member States without criminal sanctions will need to introduce new rules on criminal sanctions and ensure enforcement*
	Impact on fundamental rights: *Option interferes with Articles 47, 48, 49 and 50 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as most Member States already consider that criminal sanctions are necessary and proportionate, and the option is limited to the most serious offences.* ***In accordance with article 83 (2) of the Treaty (TFEU), the requirement of criminal sanctions for commonly defined serious forms of market abuse of the Member States is considered essential to ensure the effective implementation of the Union policy on ensuring the intergrity of the financial market. In this context, the majority of Member States have introduced criminal sanctions in national law to address market abuse. Nevertheless, the present divergent systems undermine the level playing field in the internal market and may provide an incentive for offenders to carry out market abuse in jurisdictions which do not provide for criminal sanctions for these offences. In addition, there is no EU-wide understanding on which conduct is considered to be such a serious breach. Common minimum rules on definitions for the most serious market abuse offences would facilitate the cooperation of law enforcement authoritiess in the EU.***		

	Successfully prosecuting market abuse offences under criminal law often results in extensive media coverage, which helps to deter potential defenders and has an important demonstration effect, as it shows that the competent authorities are serious about tackling market abuse.The introduction of criminal sanctions for the most serious and commonly defined market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse.		
Option 5.4.5 – minimum rules for criminal sanctions	*(+) regulators gain a tool to sanction market abuse in those MS where this is not yet available* *(++) all market participants will be subject to criminal sanctions based the same minimum principles for market abuse improving level playing field* *(+)Investors will be subject to more integer market due to the additional deterrent effect of criminal sanctions*	*(++) availability of criminal sanctions contribute strong to the objective of deterrence of market abuse* *(+) criminal sanctions contribute to improved investor protection.* *(+) contributes strongly to creation of a level playing field as similar market abuse can be addressed by criminal sanctions*	*(--)the majority of Member State will need to introduce new rules to ensure compliance*
	Impact on fundamental rights: *Option interferes with Articles 47, 48, 49 and 50 of CFR. Option provides for limitation of these rights in law while respecting essence of these rights. Limiting these rights is necessary to meet general interest objective of ensuring market integrity (by ensuring effective sanctioning of market abuse) and to protect fundamental right to property (article 17 of CFR). It is proportionate as most Member States already consider that criminal sanctions are necessary and proportionate, and the option is limited to the most serious offences.* *In the spirit of Article 83 (2) certain caution is required when introducing EU criminal law for the enforcement of a policy area. Currently, not even the definition of the most serious offences are harmonised between Member States nor is there a general requirement for criminal sanctions. It would be premature to already foresee common minimum rules on types and levels of criminal sanctions without specific evidence that a basic approximation would not be sufficient. In due coure, once there is enough evidence on the level of effectiveness of the policy option 5.4.4. it can be reconsidered whether any further EU level harmonisation is required in this area.*		
Option 5.4.6 –improve enforcement by providing for publication of sanctions and cooperation on investigation of market abuse	*(+) improved detection of sanctions by improved cooperation on market abuse by regulators.* *(+) improved detection of sanctions and publication ensure that issuers are treated equally* *(+)Investors will be subject to more integer market due to the additional deterrent effect of publication of sanctions*	*(++) publication of sanctions contribute to the objective of deterrence of market abuse (name and shame)* *(+) improved detection of sanctions and publication contributes to investor protection.* *(+) improved level playing field by better detection of market abuse and improved enforcement by publication of sanctions in all Member*	*(0/-) limited additional effort generated by publication of sanctions and improved cooperation among regulators .*

		States	

Respondents to the MAD public consultation generally supported harmonisation of sanctions at the EU level as a means to increase their deterrent effect. There was support for harmonisation of administrative sanctions at the EU level, with respondents noting that at present sanctions differed greatly between Member States and that Member States should enforce and apply MAD in a more consistent and harmonised way, with a view to reducing regulatory arbitrage. However there was also some potential uncertainty as to the practicality of complete harmonisation, especially due to the differences in markets between Member States.

In relation to the setting of minimum levels for financial penalties, there was a general consensus supporting minimum levels but some concerns about the practical implications were raised by some respondents.

There was limited specific discussion of harmonisation of criminal sanctions in the responses to the public consultation on the MAD review. Two respondents felt that penal measures should be left to member States[338], while others noted the difficulties of implementing regimes in criminal law. One respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another[339].

There was a mixed response to the option of harmonising criminal sanctions in financial services legislation in general outlined in the responses to the Communication on reinforcing sanctioning regimes in the financial services sector. On the one hand some public authorities[340] and industry or union groups[341], as well as some individual and institutional investor groups[342], were favourable to, or not against, harmonisation of criminal sanctions in the financial services sector. On the other hand, other public authorities[343], industry and institutional investor representatives[344] or others[345] were opposed to, or sceptical of, harmonisation of

338 Finnish Ministry of Finance and Central Chamber of Commerce of Finland

339 German Insurance Association (GDV)

340 Central Bank of Ireland (offences to be clearly defined), Danish FSA (but subsidiarity to be addressed) Ministry of Finance Finland (compliance with fundamental rights to be ensured), Estonian Ministry of Finance (but not a priority - EU interference with criminal law in general to be avoided, offences to be clearly defined), Spanish CNMV (offences to be clearly defined).

341 Association Française des marches financiers (offences to be clearly defined in cooperation with ESAs), Nordic Financial Union, British Bankers association (but limited consistency can be achieved due to different approaches in sentencing and standards of proof).

342 Financial Services User Group, Private Client Investment Managers and Stockbrokers (but to be properly targeted and applied carefully).

343 Czech National Bank, Swedish Ministry of Finance, Austrian FSA, Ministry of Finance and National Bank of Slovakia, Ministry of Finance of Czech Republic, ESMA; German Federal Government – not proved that conditions of Article 83(2) TFEU are met.

344 ING Group (to be left to MS, could be only defined violations eligible for criminal sanction); Austrian Federal Economic Chamber (impact on constitutional law); German Insurance association, Legal and General Group; European Association of Public Banks; European federation of Insurance Intermediaries; London Stock Exchange Group (further consultation needed); Unicredit; EUMEDION (institutional investor group), UBS AG (procedural fairness and ne bis in idem to be complied with); Bundesverband Deutscher Banken – not necessary.

criminal sanctions. At the same time, many respondents from public authorities, industry and one investor/user group took the view that criminal sanctions for the most serious offences were appropriate[346], and several banking and institutional investor representatives specifically cited market abuse as being an appropriate sector for criminal sanctions[347]. A smaller number of respondents from public authorities, industry and one consumer organisation argued that administrative sanctions were equally or more effective[348].

Based on the analysis above, options 5.4.2, 5.4.4 and 5.4.6 receive the highest score. These three options are compatible with each other and could be combined. Options 5.4.2 and 5.4.4 reinforce each other as together they more effectively strengthen the consistency, effectiveness and dissuasive effect of administrative and criminal sanctions than either option would alone. These options would provide also for an EU-wide understanding on which conduct is considered to be a serious breach of market abuse rules. The combination of these options will ensure that sanctions for similar market abuse offences across the EU are more comparable and are stricter, which will reduce the scope for regulatory arbitrage in the case of administrative sanctions and provide room for more effective law enforcement cooperation. Option 5.4.6 will reinforce options 5.4.2 by making it the rule (with limited exceptions) that sanctions should be published, and by strengthening cooperation between regulators in investigating market abuse.

These three options will also benefit from synergies with the preferred options relating to powers of regulators (section 6.1.2.1), as regulators will be able to sanction market abuse offences which currently may go undetected, which will further strengthen the dissuasive effect of sanctions. There are also synergies with the options to prevent market abuse on organised markets and platforms and in relation to commodity and related derivative markets. Clarifying and extending the scope of application of market abuse legislation as outlined in section 6.1 will ensure that market abuse on markets which currently may escape sanction altogether is

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345 Linklaters (may be an obstacle to consistent application of EU law) IMF (may create problems in cooperation between authorities).

346 Central Bank of Ireland, Danish FSA (for both legal and natural persons), Romanian National Securities Commission, Association for Financial Markets in Europe (AFME – to be avoided application of both criminal and administrative); Swedish Ministry of Finance (only as a last resort + relationship with administrative sanctions and cooperation issues to be reflected); Association Française des marches financiers; FSUG (but right to claim damages to be dissociated from the result of criminal proceedings), UBS AG (useful only against individuals); Nordic Financial Union (but financial institution to be punished instead of individuals if it benefits from the violation); Centre d'étude et de perspective stratégique (against management, more efficient than fines imposed to financial institutions); Association of Private Client Investment Managers and Stockbrokers; IMF; Estonian Ministry of Finance; CNMV (but some disadvantages: longer procedures, role of supervisors limited).

347 Association of banking insurers (e.g. for market abuses); Deutsche Bank (only in some areas e.g. market abuse); AXA Investment managers (but only where some degree of fraud is involved, e.g. market abuses, misuse of client assets).

348 ING Group, Austrian FSA, CFA Institute (civil proceeding to be preferred because faster and reduce burden of proof), European Association of Public Banks, law professor, Unicredit, Federation of German consumer organisation - VzBv (potential problems of criminal sanctions linked to lack of expertise of prosecutors, long proceedings and low priority given by Courts), ESMA (disadvantages of criminal sanctions: longer, resource consuming proceedings, lack of harmonised rules on cooperation, possible increased divergence in enforcement), Italian Banking Association.

sanctioned in a consistent, comparable and dissuasive way across the EU. As mentioned, there is a natural synergy with the options relating to powers of regulators, as the options on sanctions will ensure that where regulators detect more abuses thanks to the additional information and powers they receive, they will be able to ensure that these breaches are appropriately sanctioned.

Options 5.4.2, 5.4.4 and 5.4.6 are all in line with approach outlined in the Communication reinforcing sanctions in the financial sector[349]. They are in conformity with the Charter of Fundamental Rights as the limitations they impose on fundamental rights are necessary and proportionate to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property. In accordance with article 83 (2) of the Treaty (TFEU), the introduction of a requirement for criminal sanctions to address market abuse is likely to lead to increased succesful prosecution of market abuse offences and contribute to ensuring the effective functioning of the internal market (for a more detailed evaluation of the impacts on fundamental rights and compatibility with article 83 (2), see annex 8).

In light of the above analysis, the preferred option is a combination of options 5.4.2, 5.4.4 and 5.4.6.

8.1.5. Policy options to reduce or eliminate options and discretions

These options will be assessed against their effectiveness in achieving the specific objective of ensuring clarity and legal certainty in the market abuse framework, as well as the objective of ensuring a single rulebook and level playing field while not jeopardising investor protection and market integrity. Furthermore, these policy options will be assessed on their efficiency in achieving these objectives for a given level of resources or at least cost while avoiding unduly negative effects on market efficiency. However, options will also be assessed against other objectives where appropriate.

8.1.5.1. Option 5.5.1 – no action at EU level

As explained in the problem definition, the available material suggests that options and discretions have caused divergent implementation of the market abuse framework in the various Member States, despite the existence of coordination by CESR prior to the adoption of accepted market practices. If no action at EU level was taken these divergences would continue to exist perpetuating a lack of integration of the European market and the potential for a practice to be sanctioned in one Member State which is granted a safe harbour in another.

8.1.5.2. Option 5.5.2 - harmonise accepted market practices

With this option the concept of AMPs would be extended by granting a "European passport" to an AMP, i.e. on the basis of one regulator accepting a market practice in one Member State the AMP would be recognised as not constituting market abuse in all Member States. ESMA would need to play a coordinating role in such a process

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349 COM (716) 2010 "Reinforcing sanctioning regimes in the financial services sector", available at: http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/COM_2010_0716_en.pdf

by initiating a consultation process with all national regulators before the AMP is endorsed.

Advantages of this approach would be an increase in legal certainty for market participants as well as a further levelling of the European-playing field by ascertaining that the same rules apply across markets.

However, implementing this option does have significant disadvantages. Despite an extensive set of harmonisation measures, market structures and market models used in the EU do still differ; there is good reason for this as differences demonstrate a diversity of markets which promotes innovation, competition and a substantial degree of choice for investors. AMPs constitute a safe harbour because the practice applied is always on the edge of constituting market abuse and there can be good reasons why a regulator in another Member State based on the market structure he supervises considers an AMP as not being legal. Therefore, this option would cause a decrease in market integrity and the level of investor protection in the EU.

The majority of respondents to the public consultation, including financial companies and bodies, supported enhancing harmonisation of AMPs, although they also noted the difficulties of completing this. These responses generally felt harmonisation would help move towards a single market for financial instruments and would reduce legal uncertainty for market participants. However respondents also commented that significant differences in markets currently exist, which justify divergent implementations of accepted market practices.

While some public authorities felt involvement by ESMA in a co-ordination role would help, most felt that the current procedures were sufficient, and that further harmonisation would offer little benefit.

8.1.5.3. Option 5.5.3 - remove accepted market practices and phase-out already existing practices

With this option the concept of AMPs would be removed from the market abuse framework, with existing practices gradually being phased out and no new practices being created.

An advantage of this option would be that one level of regulatory complexity would be removed from the market abuse framework entirely, that has not in fact played a great role since its inception as can be seen by the small number of AMPs actually existing. The level-playing field would be strengthened as the application of the market abuse rules would not be explicitly limited anymore based on certain customs and practices.

The disadvantage of removing this concept would be that those market participants using AMPs would lose the benefit of operating in a safe harbour. Established practices would need to be scrutinised which could create legal uncertainty in the markets concerned. However, this disadvantage would be mitigated by the gradual phasing out of the existing AMPs. In practical terms this would mean that the AMPs would not be removed immediately upon the revised MAD framework becoming effective. Instead an appropriate grace period for the existing AMPs would be

devised during which ESMA would periodically review their continued appropriateness on a case-by-case basis.

8.1.5.4. The preferred options

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.5.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.5.2 (harmonise accepted market practices)	*(0) investment firms and investors would have the certainty of safe harbours applying EU-wide but investors' trust would be affected as practices potentially on the fringe of market abuse would be explicitly allowed in the entire EU* *(0) regulators would need to assess and consult on AMPs as they do now, but the effects of their action would have a further reach*	*(+) contribution to objective of creating a single rulebook and* *(+) enhancing clarity and legal certainty* *(-)small negative impact on investor protection and* *(-) on market integrity*	*(0) no discernible impact on resources of or compliance costs for market participants*
Option 5.5.3 (remove accepted market practices and phase-out existing practices)	*(+) investment firms and investors would benefit from greater legal certainty and a gradual move towards a single rulebook* *(0) regulators would not need to assess new AMPs anymore but periodically review the existing ones*	*(+) contribution to objective of creating a single rulebook* *(+) enhancing clarity and legal certainty* *(0) no discernible impact on investor protection and market integrity*	*(0) no discernible impact on resources of or compliance costs for market participants*

Based on the analysis above, the highest scoring option is option 5.5.3. Implementing this option would reduce a source of legal uncertainty, clarify the legal framework applicable and would be a step towards the creation of a single rulebook in the EU.

Other options assessed elsewhere will also contribute to the objective of reducing or eliminating options and discretions and reinforce the effect of this option. In particular, options 5.1.4 and 5.1.6 will ensure that all Member States have the same approach to the regulation of MTFs and suspicious transaction reports, whereas currently Member States have the discretion not to apply the MAD to MTFs. Also option 5.4.6 will remove the discretion Member States currently have not to require the publication of sanctions for market abuse. From the ensuing sections, option 5.6.3 to require issuers to inform the regulator after the event of a delay to the disclosure of inside information, option 5.7.4 to harmonise the items which regulators can request in lists of insiders and option 5.7.7 to harmonise the requirements for managers' transaction reports will also eliminate options and discretions in the current legislation. Taken together, all these options will go a long way towards the objective of creating a single rulebook and a level playing field.

In light of the above analysis, option 5.5.3 is a preferred option.

8.1.6. Policy options to clarify certain key concepts

8.1.6.1. Option 5.6.1 – no EU action

If no EU action is taken, issuers will continue to face legal uncertainty about the circumstances in which they can legitimately delay the disclosure of inside information. In addition, Member States will continue to take divergent approaches to the option of requiring issuers to inform the competent authority when delaying disclosure, resulting in a continued lack of a single rulebook and an unlevel playing field.

8.1.6.2. Option 5.6.2 - clarify conditions of delayed disclosure of inside information

Under this option, one of the criteria for judging whether or not the disclosure of inside information can be delayed, namely that delay should not be likely to mislead the public, would either be clarified or deleted altogether. Currently an attempt has been made to clarify the circumstances where delay would not be misleading through the Commission Directive 2003/124/EC[350]. This could be further developed, for example by clarifying that a delay is likely to mislead the public only when the relevant information could run counter to a market consensus, i.e., only when the investment community clearly shows (through market prices, analysts coverage or others) expectations that are contradicted by the information directly regarding the issuer[351]. Alternatively, the criterion could be deleted altogether on the grounds that it is too narrow[352].

The advantage of this option is that it would provide greater legal certainty for issuers as to the circumstances in which they can delay disclosure of inside information, thereby meeting the objective of increasing legal certainty. This option would also be efficient for issuers as it is likely to reduce their legal costs to determine whether the conditions for delay are met. By harmonising the conditions for delayed disclosure across the EU, this option would also create a level playing field in this area which would be particularly beneficial for cross-border issuers.

However this option has the significant disadvantage that it would reduce investor protection by narrowing or eliminating altogether the condition that for a delay to disclosure to take place, this delay should not mislead the public. The general objective of increasing investor protection would therefore not be met by this option. This option would also risk having a negative impact on market integrity by allowing greater scope for trading to take place by some in possession of inside information not available to the wider public.

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350 Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, OJ L339/70, 24.12.2003

351 ESME (2007), p. 9.

352 Ibid, p. 9.

8.1.6.3. Option 5.6.3 - Reporting of delayed disclosure of inside information

Under this option, issuers would be required to inform the competent authority of their decision to delay the disclosure of inside information immediately after such a disclosure was eventually made, to enable the regulator to further verify ex post if appropriate whether in fact the conditions for delay were met.

This option would have the advantage of increasing investor protection and market integrity by ensuring that inside information was not delayed except when fully justified because it was neither misleading to the public nor posed a risk of leaking and therefore being abused. By harmonising the option which Member States currently have in the Directive to require that issuers inform the competent authority this option would also have the advantage of meeting the operational objective of reducing or eliminating options and discretions.

By requiring the notification to the regulator immediately after the delayed disclosure of inside information, the responsibility for assessing whether a delay to disclosure is justified would remain with the issuer, but the requirement to inform the competent authority ex post would provide a mechanism for the regulator to further verify where appropriate whether the conditions for delay were indeed met and to sanction the issuer in the event that this was not the case.

This approach would have the disadvantage that investors' economic interests could be harmed by a delay to disclosure which was not justified, and there would be no means for them to obtain redress other than through legal action against the issuer.

Most respondents to the public consultation did not address this issue. However, one public authority argued that the risk of no disclosure at all by an issuer was greater than the risk of that issuer illegitimately delaying disclosure[353].

8.1.6.4. Option 5.6.4 - Determine conditions of delayed disclosure in case of systemic importance

Under this option, where inside information is of systemic importance (e.g. information that a bank is receiving emergency liquidity from a central bank) and it is in the public interest to delay its publication, the regulator would be given the power to permit a delay in disclosure of the information for a limited period.

This option would meet the objective of enhancing clarity and legal certainty with regard to delays to disclosure in such cases. It would not have a negative impact on investor protection as the decision to authorise a delay would be taken by the regulator based on the systemic importance of the information. In such cases there is a wider public interest in maintaining the stability of the financial system and avoiding the losses which would result from the failure of an issuer.

Many respondents to the public consultation did not address this issue. Of those who did respond, while there was some support for regulators to have the power directly, the majority of respondents (across all categories) felt that the issuer itself rather than

353 See response by FSA/HM Treasury.

the competent authority should have the appropriate responsibility. Some respondents felt this could be done by the competent authority granting a waiver from the disclosure rules. One respondent felt that the trigger should not be if the institution is systematically important, but rather if the information is systematically important, and respondents also noted that at times of emergency, regulators and issuers would already be involved in close communication.

8.1.6.5. Option 5.6.5 - clarify disclosure of managers transactions

Under this option it would be clarified in the market abuse framework that transactions made for managers of the issuer by portfolio managers or transactions where managers of the issuers pledge or lend their shares do qualify as transactions that need to be reported.

An advantage would be that additional types of transactions will also be accessible to the public that are similar to sales or purchases by the manager him- or herself and may convey important information. In addition, legal certainty for issuers and managers regarding the scope of the reporting obligation would be enhanced.

A disadvantage would be that issuers may have to report more transactions, increasing slightly the costs imposed by the market abuse framework. However, this seems to be justified by the additional market transparency achieved and issuers and managers benefit from greater clarity about what needs to be reported.

This option is supported by CESR[354].

8.1.6.6. The preferred options

_	*Impact on stakeholders*	*Effectiveness*	*Efficiency*
Option 5.6.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.6.2 (clarify conditions for delayed disclosure of inside information)	*(+) issuers obtain greater freedom to delay disclosure of inside information* *(- - -) investors have less transparency on actions of issuers in their investment decisions* *(-) regulators may have to investigate more cases of delayed disclosure or insider trading*	*(+) Partially meets objective of greater legal certainty (for issuers)* *(+) Partially meets objective of a level playing field (for issuers)* *(- - -) Negative impact on investor protection*	*(+) Likely to reduce costs for issuers but* *(-) Could increase costs for regulators who may have to investigate more cases of delayed disclosure or insider dealing*
Option 5.6.3 (Reporting of delayed disclosure of inside information)	*(-) issuers face costs (see section 6.8)* *(+++) regulators gain a mechanism to control delays to disclosure* *(+++) investors better protected by strictly limited delays to disclosure*	*(+++) Meets objectives of increasing investor protection and market integrity* *(+++) Eliminates an option in the current directive*	*(-) Likely to impose increased costs on issuers and regulators, but these are mitigated by 'ex post' option*

[354] CESR Consultation Paper, *"Market Abuse Directive Level 3 – Fourth set of CESR guidance and information on the common operation of the Directive to the market"*, CESR/10-1168, p. 10

Option 5.6.4 (Determine conditions of delayed disclosure in case of systemic importance)	*(+) issuers obtain greater clarity* *(0) neutral for investors as permission of regulator needed and losses due to failure or financial instability limited* *(+) regulators gain legal certainty*	*(+++) Meets objective of greater legal certainty* *(0) Neutral impact on investor protection and market integrity*	*(0) Cost implications limited as such cases are relatively rare*
Option 5.6.5 (clarify disclosure of managers transactions)	*(+) issuers and* *(+) regulators would benefit from enhanced legal certainty* *(+) investors would benefit from additional publicly available information*	*(+) Meets objective of greater legal certainty for issuers and regulators* *(+) Meets objective of increasing investor protection*	*(-)Likely to slightly increase costs for issuers due to additional reports*

Most respondents to the public consultation did not address option 5.6.3. However, one public authority argued that the risk of no disclosure at all by an issuer was greater than the risk of that issuer illegitimately delaying disclosure[355]. Many respondents to the public consultation did not address option 5.6.4. Of those who did respond, while there was some support for regulators to have the power directly, the majority of respondents (across all categories) felt that the issuer itself rather than the competent authority should have the appropriate responsibility. Some respondents felt this could be done by the competent authority granting a waiver from the disclosure rules. One respondent felt that the trigger should not be if the institution is systematically important, but rather if the information is systematically important, and respondents also noted that at times of emergency, regulators and issuers would already be involved in close communication. Option 5.6.5 is supported by CESR[356].

Based on the analysis above, the highest scoring options are options 5.6.3, 5.6.4 and 5.6.5. These options are compatible with each other and could be combined. Indeed a combination of options 5.6.3 and 5.6.4 would ensure greater legal certainty in respect of delayed disclosure while eliminating an option in the Directive. Combining these options would therefore contribute effectively to the objective of creating a single rulebook and a level playing field. These options would also provide additional tools for enforcement by regulators, as they would be systematically informed of delayed disclosure and could therefore sanction delays which were not in compliance with market abuse rules; regulators would also have clear powers to allow a delay to disclosure of inside information in the case of systemically important information. In combination these options would therefore also contribute to achieving the specific objective of effective enforcement by regulators.

The preferred option is therefore a combination of options 5.6.3, 5.6.4 and 5.6.5.

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355 See response by FSA/HM Treasury.

356 CESR Consultation Paper, *"Market Abuse Directive Level 3 – Fourth set of CESR guidance and information on the common operation of the Directive to the market"*, CESR/10-1168, p. 10

8.1.7. Policy options for reducing administrative burdens, especially on SMEs

These options will be assessed against their effectiveness in achieving the specific objective of reducing administrative burdens for issuers of financial instruments admitted to trading while at the same time avoiding unduly negative effects on market integrity, investor protection and market transparency. For SMEs specifically the options will also be assessed against the objective of making it more attractive for SMEs to raise finance via securities markets. Furthermore, these policy options will be assessed on their efficiency in achieving these objectives for a given level of resources or at least cost while avoiding unduly negative effects on market efficiency. However, options will also be assessed against other objectives where appropriate.

8.1.7.1. Option 5.7.1 – no action at EU level

As explained in the problem definition, there are shortcomings in relation to the design and application of the issuer-related obligations in the Market Abuse Directive. In addition, applying the issuer obligations in an undifferentiated manner to SMEs may continue to deter small issuers from raising capital via the capital markets. These shortcomings would remain if no action at EU level was taken.

8.1.7.2. Option 5.7.2 - SME regime for disclosure of inside information

Under this option, SMEs would be required to disclose inside information in a modified and simplified market-specific way. To that end a more specific obligation for disclosure of inside information by SMEs would be set out in the Directive. Rather than applying a general test for disclosure of inside information SMEs would follow a more prescriptive test. Rationale for this would be that information published by large issuers does need to potentially cover a much broader range of information and so it is appropriate that the test needs to be very general. By contrast the scope and size of the business of an SME is much more restricted and the events giving rise to the need to disclose inside information are typically more limited and so it is appropriate for the disclosure test to be more focused.

This option as well as options 3, 5 and 8 need to be assessed in conjunction with the potential creation of the "SME Market" which the Commission services are currently considering as part of the review of the Markets in Financial Instruments Directive[357]. A modified disclosure obligation would thus be one element characterising such an SME Market and would only apply to those SMEs deliberately choosing their admission to trading on such specifically designed SME markets.

This option would attain the regulatory objectives of reducing administrative burdens for SMEs and making it easier for them to raise capital on the markets, as SMEs would incur lower compliance costs in relation to monitoring information and assessing when it needs to be disclosed to the public. Implementing this option could also contribute to establishing a specific single rulebook for small issuers that would

[357] The consultation document on the MiFID can be found at this page: http://ec.europa.eu/internal_market/consultations/2010/mifid_en.htm

be recognisable throughout Europe and may attract more investors on an EU-wide basis to invest in SMEs, thereby promoting the single market.

Potential disadvantages would be that the level of transparency and the degree of supervision on the SME Markets could be slightly different in comparison to the standard market segments. Applying it in a modified format may discourage the investing public from entering those markets. However, this risk is diminished by the fact that most investors would be aware that this is the market segment intended specifically for SMEs. It would be transparent to investors that modified requirements apply in order to alleviate administrative burdens and allow easier access to capital markets for smaller issuers. Investors could then make an informed choice whether they want to invest on such a specialist market. A substantive set of obligations would still apply to trading on those markets so that overall a sufficiently high degree of investor protection is preserved. These requirements originate from the MiFID framework but also, as an example, the obligation for intermediaries to report suspicious transactions to supervisory authorities would apply to financial instruments on SME Markets. On balance, an increase in investor protection may even be achieved by implementing this option if it induces issuers to make the step-up from lesser regulated environments (i.e. not admitted to trading on a trading venue) to an SME Market.

Over half of the respondents to the public consultation did not express a strong opinion on this issue, although a number of these commented that further analysis should be conducted. Approximately a quarter of respondents did not feel a specialist regime for SME issuers was necessary, whilst approximately one fifth supported an SME regime. Those supporting a specialist regime felt that it was essential to give SMEs access to finance in order to encourage growth in the SME market. Further, it was felt that a proportionate regime would appropriately reflect the difference in size between SMEs, who have limited resources, and larger firms, who command more resources, whilst striking a balance of consumer protection. These respondents generally favoured the application of secondary market aspects of the MAD but considered it proportionate to modify some of the primary market requirements – such as insider lists and directors dealings obligations that apply to issuers.

Of the approximately one quarter of respondents who did not support a specifically adapted regime, most felt that MAD was a cornerstone of financial market stability and that reductions in its scope could reduce investor protection which they feel is critical to EU markets.

8.1.7.3. Option 5.7.3 - SME exemption for disclosure of inside information

This option would go one step further than option 2 and completely exempt issuers on SME markets from the obligation to disclose inside information.

Option 3 would thus reduce compliance costs even more radically than option 3 for SMEs and would also attain the other objectives described under option 2.

The disadvantages of this option are, however, more severe than under option 2. The obligation to disclose inside information is one of the cornerstones of the Market Abuse Directive, ensuring timely and consistent information of investors and serving

as an important preventive measure against insider trading. Exempting small issuers from this obligation completely would significantly reduce the transparency of an SME Market. Supervising insider trading would be more difficult for regulators and investor protection thus considerably decreased. Investors would regard a market without a disclosure duty applying as substandard[358] and would be very cautious in committing investments.

A large majority of respondents to the public consultation who addressed this issue opposed exempting SME issuers from the obligation to disclose inside information as they felt that disclosure requirements were essential to market integrity, and that they should not be compromised.

8.1.7.4. Option 5.7.4 - harmonise insiders' lists

This option would entail prescribing conclusively the precise data an insider list has to contain in relation to each individual included on the insider list, rather than prescribing only minimum requirements. One example would be the identification of individuals which could be by first name and surname only or also by additional details such as date and place of birth, address etc.

Such a harmonisation would lower administrative burdens especially for issuers listed on markets in more than one jurisdiction, as they could adapt one European-wide format for their insider lists rather than having to modify them on a Member State specific basis. It would enhance legal certainty for all issuers and contribute to a further integration and level-playing field across the European markets as a whole. A harmonisation measure would not be to the detriment of investor protection.

A disadvantage of this option is that some regulators may not wish to lose their discretion in determining which data fields need to be included in insider lists as they are comfortable with their current requirements and have tested them to work reasonably well in practice. However this could be addressed by ensuring thorough discussions between ESMA and Member States on which fields are required so that day-to-day market abuse supervision works as efficiently and smoothly as possible.

Most responses to the public consultation did not directly address this specific issue. However in their response to the public consultation, the issuers association argued that issuer obligations should be simplified for all companies in the EU, not just SME issuers[359].

8.1.7.5. Option 5.7.5 - SME exemption for insiders' lists

Under this option, SMEs listed on an SME Market would be exempted from the obligation to draw up insiders' lists, while they would remain subject to a requirement to ensure that employees were reminded of their obligations and the prohibitions on market abuse in the MAD.

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358 Numerous respondents to the consultation emphasised that investors in SME markets need the same level of protection as investors in other markets, cf. responses of European Savings Banks Group, Danish FSA, German Association of Energy and Water Industries (BDEW), World Economy, Ecology and Development (WEED), Czech National Bank, German Federal Ministry of Finance

359 See response by European Issuers.

This option would reduce regulatory complexity for small issuers, therefore, achieving the objective of decreasing administrative burden. This would also contribute to the objective of increasing the attractiveness of securities markets for the financing of SMEs and the objective of ensuring a single rulebook for small issuers as described under option 2.

A disadvantage could be that supervisory authorities may find combating market abuse more burdensome due to the absence of insider lists, which have proved to be a useful tool in supervisory practice. However, insider lists for small issuers are not as comprehensive as for large multi-national undertakings. Therefore, conducting investigations without being able to consult insider lists first does appear feasible without lowering the existing level of market surveillance and investor protection significantly.

8.1.7.6. Option 5.7.6 - abolish managers' transactions reporting

Under this option the provisions in the Market Abuse framework requiring managers of issuers to report transactions in shares of the said issuer, or in associated derivatives or other financial instruments by managers and persons closely associated with them, would be abolished.

Implementing this option would have the advantage of reducing issuer-related administrative burdens. Transactions by managers and closely related persons would not need to be monitored and reported to supervisory authorities within a period of five working days anymore.

A disadvantage of not requiring directors' dealings anymore would be that the deterrent effect the reports have on managers from engaging in insider trading would disappear. As the managers' transaction reports need to be made publicly available they also serve as a useful tool for investors in estimating how managers of issuers themselves assess the current and future development of a share price. Hence, another disadvantage is that a well-established transparency feature of capital markets would be lost.

8.1.7.7. Option 5.7.7 - harmonise managers' transactions reporting and raise threshold

With this option the currently existing threshold of €5,000 in a year below which managers' transactions do not need to be reported would be adjusted to a figure of €20,000. According to the existing rules application of this threshold depends on the discretion of the Member States. Under this option the €20,000 threshold would in the future apply uniformly in the EU.

An advantage of raising the threshold would be that relatively small and insignificant deals by managers would not need to be reported anymore which would result in a moderate reduction of administrative burdens for issuers. Harmonising the application of the threshold by making it compulsory all over Europe would evidently reduce the number of notifications for issuers in Member States which currently do not apply the threshold and would, in addition, level the European playing field and increase legal certainty for issuers.

A disadvantage would be a moderate reduction in market transparency which would not harm investor protection as even a slightly increased threshold would still serve as a deterrent against engaging in insider trading and investors would still be informed about significant deals conducted by managers.

8.*1.7.8. Option 5.7.8 - SME regime for managers' transaction reporting*

This option would introduce an alternative regime for reporting managers' transactions for issuers listed on SME Markets. Such a regime would require disclosure of managers' transactions not when transactions reach an absolute figure but rather when a certain small percentage of market capitalisation (0.02%) of the issuer is reached. Such an approach would tie in with the specific structure of a significant number of SMEs where there is one majority shareholder who is also the key operative of the SME. Mainly transactions by this manager are of interest to the investing public and significant deals of him/her would still need to be disclosed under this alternative regime.

The advantage of such an alternative approach would be that the number of reports necessary for SMEs would be reduced constituting a slightly reduced administrative burden.

However, this approach would add a certain level of complexity for issuers in determining reporting obligations (measuring transactions against market capitalisation rather than having a fixed absolute figure). Also reporting of managers' transactions of issuers in SME Markets would apply at different levels which would not contribute to a uniform "quality label" of SME Markets in the union, retail investors in particular may find it difficult to determine at what level the reporting obligation applies per issuer, and the overall transparency of the regime would be blurred.

8.1.7.9. The preferred options

	Impact on stakeholders	*Effectiveness*	*Efficiency*
Option 5.7.1 (baseline)	*n.a.*	*n.a.*	*n.a.*
Option 5.7.2 (SME regime for disclosure of inside information)	*(++) SMEs would profit from a simplified regime* *(-) regulators would need to adapt by supervising a modified, additional rule* *(+) investors may benefit from a wider choice of SMEs accessing the capital markets*	*(+) contribution to objective of reducing administrative burden* *(++) one feature in concept of making the raising of finance on capital markets more attractive to SMEs* *(-) limited impact on market transparency and* *(-) investor protection as disclosure obligation would be reduced in scope*	*(+) SMEs would need slightly fewer resources to comply with disclosure obligation* *(-) regulators would need to commit slightly more resource to cope with an adapted rule*

Option 5.7.3 *(SME exemption for disclosure of inside information)*	*(-) SMEs would not have to adhere to the obligation anymore but investments in SMEs would be limited due to a lack of investor confidence* *(---) regulators would face problems in supervising the insider trading prohibition* *(--) investors would rate a market as substandard where the disclosure obligation for inside information does not apply*	*(+) contribution to objective of reducing administrative burden* *(0) on balance, would not improve the attractiveness of raising finance on capital markets to SMEs* *(---)severe impact on market transparency,* *(---) integrity and* *(---) investor protection*	*(++) SMEs would need significantly fewer resources to comply with issuer-related obligations on trading venues* *(--) regulators would need to expand on resources significantly to supervise SME markets*
Option 5.7.4 (harmonise insiders' lists)	*(+) issuers would benefit from the certainty and uniformity of harmonised rules* *(0) regulators could work equally well with harmonised requirements* *(0) no discernible impact on investors*	*(+) contribution to objective of reducing administrative burden* *(0) no discernible impact on market transparency, integrity and investor protection*	*(+) issuers would need slightly fewer resources for compliance*
Option 5.7.5 (SME exemption for insiders' lists)	*(++) SMEs would not need to commit resources to drawing up insiders' lists* *(-) regulators cannot use lists as a supervisory tool for SME issuers* *(0) no discernible impact on investors*	*(+) contribution to objective of reducing administrative burden* *(+) contribution to objective of making the raising of finance on capital markets more attractive to SMEs* *(0) no discernible impact on market transparency, integrity and investor protection*	*(+) SMEs would not need to commit resources to the drawing up of insiders' lists*
Option 5.7.6 (abolish managers' transactions reporting)	*(+) issuers would feel impact of reduction in regulatory complexity and transparency as to dealings of their directors* *(-) regulators would lose benefit of deterrent effect of disclosure duty in relation to engaging in insider trading* *(--) investors would lose access to an important feature of capital market transparency*	*(++) strong contribution to objective of reducing administrative burden* *(---) severe impact on market transparency and* *(-) small impact on investor protection*	*(++) issuers could reduce resources committed to fulfilling issuer-related obligations significantly* *(--) market efficiency is reduced significantly due to important information not contributing to the valuation of instruments anymore*
Option 5.7.7 (harmonise managers' transactions reporting requirements and raise threshold)	*(+) issuers would benefit of moderate reduction of transaction reports* *(0) regulators and* *(0) investors would not be discernibly affected*	*(+) contribution to objective of reducing administrative burden* *(0) negligible impact on market transparency and no impact on market integrity and investor protection*	*(+) issuers could slightly reduce resources committed to compliance with reporting obligation*
Option 5.7.8 (SME regime for managers' transaction	*(+) SMEs would benefit of further moderate reduction of transaction reports* *(-) regulators would need to adapt to*	*(0) negligible contribution to objective of reducing administrative burden and* *(0) making the raising of*	*(0) SMEs resources committed to compliance would not be discernibly reduced*

reporting)	*additional rule* *(-) investors would lose benefit of clearly fixed threshold applying uniformly for all issuers*	*finance on capital markets more attractive to SMEs* *(-) small impact on market transparency*	

Over half of the respondents to the public consultation did not express a strong opinion on option 5.7.2, although a number of these commented that further analysis should be conducted. Approximately a quarter of respondents did not feel a specialist regime for SME issuers was necessary, whilst approximately one fifth supported an SME regime. Those supporting a specialist regime felt that it was essential to give SMEs access to finance in order to encourage growth in the SME market. Further, it was felt that a proportionate regime would appropriately reflect the difference in size between SMEs, who have limited resources, and larger firms, who command more resources, whilst striking a balance of consumer protection. These respondents generally favoured the application of secondary market aspects of the MAD but considered it proportionate to modify some of the primary market requirements – such as insider lists and directors dealings obligations that apply to issuers.

Of the approximately one quarter of respondents who did not support a specifically adapted regime, most felt that MAD was a cornerstone of financial market stability and that reductions in its scope could reduce investor protection which they feel is critical to EU markets. A large majority of respondents to the public consultation who addressed the issue opposed exempting SME issuers from the obligation to disclose inside information as they felt that disclosure requirements were essential to market integrity, and that they should not be compromised.

Most responses to the public consultation did not directly address option 5.7.4. However in their response to the public consultation, the issuers association argued that issuer obligations should be simplified for all companies in the EU, not just SME issuers[360].

Based on the analysis above, the highest scoring options are options 5.7.2, 5.7.4, 5.7.5 and 5.7.7. These four options are compatible with each other and could be combined.

A combination of such options would comprehensively reduce the administrative burdens related to the issuer-related requirements of the market abuse framework, and would establish a tailored market abuse regime for SMEs with a reduced administrative burden on them (see table below). Larger enterprises would benefit particularly from the reduction in administrative burden associated with the harmonised conditions for insider lists (5.7.4) and harmonised requirements for managers' transaction reports (5.7.7), and these options would also eliminate discretions in the current legislation for regulators to impose additional requirements, thereby reinforcing the options for creating a single rulebook and level playing field (see section 6.1.3).

360 See response by European Issuers.

As a result the preferred option is a combination of options 5.7.2, 5.7.4, 5.7.5 and 5.7.7.

ANNEX 9 - THE MARKET ABUSE REGIME IN THE UNITED STATES

In the United States, market manipulation and insider dealing are covered by the antifraud provisions of the Securities Exchange Act of 1934 (the "**1934 Act**").

Market manipulation

Section 9 of the 1934 Act prohibits the manipulation of securities prices by creating a false or misleading appearance of active trading in such securities, or through the practices of false or misleading statements or dissemination of information in order to secure prices at abnormal levels. The Dodd-Frank Act now clarifies that this prohibition applies to any security other than a government security, any security not registered on a national securities exchange, or in connection with any security-based swap or security-based swap agreement with respect to such security.[361] The 1934 Act did not expressly prohibit manipulation in OTC securities. However, already before the Dodd-Frank Act amendments, the courts have interpreted Rule 10b-5's broad prohibition against securities fraud (as described below) to prohibit market manipulation in the OTC market.[362]

Insider Trading

No federal statute defines insider trading. Section 10(b) of the 1934 Act[363] is a catchall provision which prohibits "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 10(b) has been implemented by Rule 10b-5,[364] which has been generally interpreted by the courts to prohibit securities fraud. Over the time the courts have developed a regime that prohibits insider trading based on implied duties of confidentiality: any person in the possession of material, nonpublic information has a duty to disclose the information (or abstain from trading) if the person obtains the information in a relation of trust or confidence.[365] The SEC offers a restatement of federal insider trading law in its Rule 10b5-1.[366]

Therefore the 1934 Act and its implementing rules prohibit securities price manipulation by corporate insiders. The paradigm case of insider trading arises when a corporate insider trades securities using material, non public information obtained through the insider's corporate

361 Security-based swap as defined by Section 3(63) of the 1934 Act.
362 *SEC v. Resch-Cassin & Co.*, 364 F. Supp.964 (S.D.N.Y. 1973).
363 Regulation of the use of manipulative and deceptive devices.
364 Employment of manipulative and deceptive devices.
365 See *Chiarella v. United States*, 445 U.S. 222 (1980).
366 Trading “on the basis of” material non-public information in insider trading cases, according to which the "manipulative and deceptive devices" prohibited by Section 10(b) of the Act and Rule 10b-5 thereunder "include, among other things, the purchase or sale of a security of any issuer, on the basis of material non-public information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material non-public information."

position. Moreover, under the misappropriation theory,[367] 10b-5 liability arises also in cases of outsider trading, i.e. when a person trades on confidential information in breach of a duty owed to the source of the information, even if the source is a complete stranger to the traded securities.

Regulation FD complements the statutory and implementing provisions on insider trading by forbidding public companies from selectively disclosing material, non-public information. This applies to specific market professionals as well as security holders who it is reasonably foreseeable will trade on the basis of the information. Therefore, when the disclosure is intentional issuers must disclose inside information to the investing public *simultaneously* with any disclosure to selected analysts or investors. If the disclosure is unintentional, the issuer must disclose the information to the public *promptly*.[368]

Enforcement and sanctions

The SEC has the power to make such investigations as it deems necessary to determine whether any person has violated, is violating, or *is about to violate* any provision of the 1934 Act.[369] The SEC has broad administrative authority to ensure compliance of the federal securities laws,[370] and whenever it appears that any person is engaged or *is about to engage* in acts or practices constituting a violation of any provision of the 1934 Act, it has the power to bring a judicial action, to enjoin such acts or practices, and to be granted a permanent or temporary injunction or restraining order. The SEC can also refer such acts or practices as may constitute willful violation of the 1934 Act to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings.[371] The SEC can refer cases to the US DoJ for criminal prosecution to punish those who engage in willful violations of the 1934 Act (market fraud and insider trading).[372] The SEC can also seek disgorgement of any profits[373] and civil monetary penalties,[374] beyond disgorgement, by any person who has violated the securities laws.

In addition to the SEC enforcement described below, the 1934 Act authorizes a private action for persons injured by market manipulation prohibited by Section 9.

Moreover, for insider trading:

– Section 20A limits recovery to traders whose shares were contemporaneous with the insider's.[375] Recovery is based on the disgorgement of the insider's actual profits realized or losses avoided, reduce by any disgorgement obtained by the SEC under its authority to seek injunctive relief.

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367 See *U.S. v. O'Hagan*, 521 U.S. 642 (1997). See also Rule 10b5-2 on Duties of trust or confidence in misappropriation insider trading cases. This means that a stranger who overhears the information or develops it on his own has no 10b-5 duties.

368 See Regulation FD, Rule 100(a). However, Regulation FD is enforceable only through SEC enforcement actions and does not give rise to 10b-5 liability or private enforcement. See Rule 102.

369 See Section 21(a)(1) of the 1934 Act – "Investigations; Injunctions and Prosecution of Offenses."

370 See Section 21C of the 1934 Act – "Cease-and-Desist Proceedings."

371 See Section 21(d)(1) of the 1934 Act – "Investigations; Injunctions and Prosecution of Offenses."

372 See Section 32(a) of the 1934 Act – "Penalties." Maximum criminal fines are up to $5m ($25 for non natural persons) and jail sentences to 20 years.

373 See Section 21B(e) of the 1934 Act – "Civil Remedies in Administrative Proceedings."

374 See Section 21(d)(3) of the 1934 Act – "Investigations; Injunctions and Prosecution of Offenses."

375 See Section 20A of the 1934 Act – "Civil liability to contemporaneous traders."

- Owners of confidential information who purchase or sell securities can also bring a private action under Rule 10b-5 against insider traders and tippees who adversely affect their trading prices.
- The SEC can bring a judicial enforcement action seeking a court order that enjoins the insider trader or tippee from insider trading and that compels disgorgement of any trading profits.[376]
- To add deterrence, the SEC can also seek a judicially imposed civil penalty of up to three times the profits realized or losses avoided by the insider trading.[377] The SEC can also seek civil penalties against employers and others who control insider traders and tippers.[378]

The Dodd-Frank Act has also introduced a new Section 21F on "Securities Whistleblower incentives and protection[379]" which grants awards[380] to whistleblowers who voluntarily provides original information to the Commission that leads to the successful enforcement of judicial or administrative action resulting in monetary sanctions exceeding $1m. The protection of whistleblowers is ensured by the prohibition against any retaliation by the employer and some confidentiality provisions on the identity of a whistleblower.

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376 See Section 21B(e) of the 1934 Act – "Civil Remedies in Administrative Proceedings."

377 See Section 21A(a)(2) of the 1934 Act – "Civil Penalties for Insider Trading."

378 See Section 21A(a)(3) of the 1934 Act – "Civil Penalties for Insider Trading."

379 See also the SEC proposed rules for implementing the whistleblower provisions of section 21f of the securities exchange act of 1934 at http://www.sec.gov/rules/proposed/2010/34-63237.pdf

380 Not less than 10% and no more than 30% of the monetary sanctions imposed to be paid from the SEC Investor Protection Fund established in the Treasury of the United States.

ANNEX 10 – ADMINISTRATIVE BURDEN

In order to determine the administrative burden of the policy options, an external study[381] was conducted by EIM on behalf of the Commission which assessed the effects of the change in the Market Abuse Directive. The methodology of the study is based on the application of the Standard Cost Model (SCM) to determine the administrative burden caused by legislation. In addition, one-off compliance costs were determined with regard to some information obligations. To determine the impact of new rules, interviews were conducted with relevant stakeholders including financial markets, banks and investment firms and issuers including SMEs. Particular attention was given to impact of administrative burden on SME issuers.

In this context, administrative burden is defined, in accordance with the impact assessment guidelines, as the information obligations for businesses, for citizens and national/regional/local administrations that are likely to be added or eliminated if a policy option were implemented.

The preferred options which are estimated to have an impact on administrative burden are the following:

- Extending the scope of the MAD to MTFs (option 5.1.4)
- Extending the scope of the MAD to other organised trading facilities (Option 5.1.5);
- Extending suspicious transaction reporting to suspicious OTC transactions and suspicious orders (option 5.3.2)
- Requiring issuers to notify competent authorities *ex post* of delays to disclosure of inside information (Option 5.6.3);
- An SME regime for disclosure of inside information (5.7.2)
- Harmonising the requirements for insider lists Option (5.7.4);
- SME exemption for insiders lists (option 5.7.5)
- A harmonising the conditions for reporting of managers transaction reports (option 5.7.8), including increasing the threshold (option 5.7.8).

- The impacts of these options on administrative burden are further explored below.

<u>Extending the scope to MTFs (option 5.1.4)</u>

According to a study carried out by external consultants for the Commission services[382], the estimated administrative burden of the current MAD provisions in terms of surveillance obligations is in the order of € 2.7 million. The number of MTFs estimated not to comply fully with the MAD at present is estimated to be 44[383]. The additional administrative burden for MTFs of extension of the scope of the MAD is estimated at EUR 211,650 per year for all 44 MTFs or an average of EUR 4,810 per MTF. This covers the extension of existing surveillance software already available for their internal controls[384]. This number does not

381 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, See annex 13

382 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, see annex 13

383 On a total of 127 MTFs, it is estimated that 44 do not need to fully comply with current MAD requirememts, (more specifically, 4 MTF2s and 40 MTF3s) EMI, Effects of the change in the Market Abuse Directive, 2010.

384 Given the high level of uncertainty regarding the estimates, care should be taken in using these results.

cover the one- off cost related to developing monitoring systems which amount to EUR 1 Million, 70% of which could be considered business as usual. Therefore, this option is expected to imply EUR 300.000 one-off cost to comply with the information obligation.

<u>Extend the scope to other organised trading facilities (OTFs) option 5.1.5</u>

The administrative burden of extending the scope of the MAD to other organised trading facilities is estimated at EUR 481,000. These costs relate to surveillance costs of these markets. As the study on administrative burden[385] does not cover this topic, the Commission services have estimated the administrative burden based on the assumption of 100[386] of such facilities operating in EU markets and similar cost (as for MTFs) of EUR 4,810 per facilities.

<u>Extending suspicious transaction reporting to orders and OTC transactions (option 5.3.2)</u>

a) Extension to suspicious OTC transactions

When the reporting obligation is extended to OTC transactions, the total administrative cost is estimated at € 29 million in one-off costs, and € 29 million per year in ongoing costs. This is based on an assumed investment cost of EUR 11.250 and an annual cost of EUR 11.250 per institution to report OTC transactions. These costs relate to the extension of monitoring systems and the reporting when suspicious transactions would occur. In addition it takes into account that only 40% of financial institutions trade in OTC Derivatives. This assumption was based on a survey of respondents to the EIM study. This leads to a recurring administrative burden of EUR 29 million and a one off cost of EUR 29 million to comply with the information obligation.

b) Extension to suspicious orders

Introducing a requirement to report suspicious orders is expected to lead to administrative costs of EUR 56,000 one-off cost and EUR 28,000 recurring costs per institution as this would lead to considerable redesign of the order system. The one-off cost relates to the modifications and adaptations of the ordering systems to ensure that orders can be monitored and suspicious transactions can be identified. Recurring costs relate to the identification and reporting of suspicious transactions, and is expected to require on average annually 625 manhours. Based on research by the EIM study, it is assumed that currently only 20% of institutions already comply with this measure. Other institutions would need to adapt their surveillance systems and report suspicious orders where necessary. Due to the limited number of institutions who currently monitor suspicious orders, the total costs are estimated at EUR 145 million recurring administrative burden and EUR 291 million one-off compliance cost linked to the information obligation.

<u>Requirement for issuers to notify competent authorities *ex* post of delayed disclosure (option 5.6.3)</u>

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385 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, see annex 13

386 As no statistical data are available on such facilities, the Commission services estimate the number of "other trading facilities" on 100 other trading facilities, based on 9 crossing networks (see: Celent, MiFID, spirit and reality of a European Financial Markets Directive, September 2010, p29) and the members of the Wholesale Market Brokers Association. http://www.wmba.org.uk/member.php which would be covered by the definition, taking into account that the actual number will depend on the definition of organised trading facilities.

Currently, according the study on administrative burden[387], 16 Member States require issuers to notify the competent authority of decisions to delay disclosure of inside information and 11 do not. About 42% of all large enterprises and 45% of all SME issuers are located in one of the Member States which already require this obligation. For large enterprises the cost is estimated at EUR 17,550 for large enterprises and for SME issuers the cost is considered EUR 1,755 per year. It should be noted that the costs for enterprises relate to the investigation to delay disclosure and of external costs due for legal advice. Therefore the existing administrative burden in these Member States is respectively 92 million for large enterprises and 1.5 million for SME issuers. Extending the scope of the obligations to the 11 Member States who currently do not provide for these requirement will result in an incremental recurring administrative burden of EUR 127 million for large enterprises and EUR 1.8 million for SMEs. This is based on the assumption that large issuers would have 5 such cases and small would have 0.5 of such cases per year. It should be noted that this might be an overestimation of the costs as not all issuers would be subject to disclosure requirements and small enterprises in the survey did not report any delay of disclosure.

SME regime for disclosure of inside information. (option 5.7.5)

An SME regime for disclosure of inside information would mean that SME issuers would be required to disclose inside information in a simplified market-specific way. This could be done by a specific checklist for SMEs on which information is considered inside information. This option is expected to reduce administrative burden for SMEs. In order to estimate what this reduction would consist in, the current administrative burden of disclosure of inside information for the 1.900 SME issuers is based on following assumptions for the distinct cost elements: identification, analysing and disclosing of inside information. Cost elements relate to the identification, and then the disclosure, of inside information. For SMEs, the total cost per year for identifying inside information is therefore estimated at EUR 2.7 million, of which according to the study 80% is business as usual and EUR 500.000 can be considered linked to the existing MAD provisions.[388] In addition, disclosing this information is estimated to imply 39 hours per SME issuer at an hourly cost of EUR 45. For all 1900 SME issuers this would imply a yearly cost of EUR 3.3 million or EUR 1755 per SME. Therefore, the total existing administrative burden for disclosure of inside information is estimated at EUR 3.8 million for SME issuers. We estimate that the SME regime, which implies a simplified and market-specific disclosure process for inside information, would lead to a reduction 30% in administrative burden, which would lead to costs saving of EUR 1.1 Million for SME issuers.

Harmonising the requirements for insider lists (option 5.7.4)

The current yearly administrative burden of implementing and updating the insiders' list is estimated by the study at € 945 for SME issuers and almost € 2,025 for large issuers. For the whole EU, this represents a cost of EUR 1,8 million for SME issuers and EUR 25 million for other issuers. According to the study, the harmonisation of the elements of information to be included in the insiders' list could reduce this cost by 5% or EUR 94 for other issuers. Total administrative burden reduction of this measure is therefore estimated at EUR 1.2 million for other issuers.

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387 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, see annex 13

388 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, see annex 13

Exempt SMEs from insiders lists (option 5.7.5).

Based on the above, exempting SME issuers from the requirement to keep insiders' lists would reduce the administrative burden on SME issuers by EUR 945 per SME per year, giving a total reduction of administrative burden on SMEs of EUR 1.8 million per year. SMEs would only be required if there is a suspicious of market abuse, to provide who has inside information.

Harmonising the conditions for reporting of managers transaction reports, including increasing the threshold (option 5.5.8)

According to the study, the administrative burden of the current obligation in the Directive is estimated to be € 135 per SME issuer per year (based on 2 reports) and € 405 per large issuer per year (6 reports). The total managers' transactions reports per year, with the existing threshold of EUR 5.000, is estimated at 78.800 transactions reports per year with a threshold of EUR 5.000. A questionnaire among CESR Members found that that 41% of managers' transactions concerned transactions are below EUR 20.000. Therefore, increasing the threshold to 20.000 would lead to a reduction of 32.000 transaction reports. This implies an administrative burden reduction of EUR 2.2 million for large issuers and 0,1 for SME issuers.

Total administrative burden linked to the revision to MAD

In light of the above, the overall impact of the revision of the MAD in terms of administrative burden is estimated to be of the order of EUR 297 million recurring administrative burden. In addition, a one off cost for complying with the information obligation is estimated at EUR 320.3 million. For the specific case of SMEs, the net administrative burden would be reduced with EUR 1.2 Million.

Table 3: overview of admin burden of the MAD

Policy option	description	Incremental cost per entity (EUR)			Total incremental cost (Million EUR)	
			Recurring Admin burden	One- off cost	recurring annual admin burden (million EUR)	One of cost (million EUR)
5.1.4	Extending scope to MTFs		4,810		0.2	0.3
5.1.5	Extening scope to OTFs		4.810		0.5	
5.3.2	reporting of suspicious OTC transactions and orders	OTC	11,250	11,250	29	29
		Orders	28,000	56,000	145	291
		Total			147	320
5.6.3	Reporting of delayed disclosure	LE	17,550		127	
		SMEs	1755		1.8	
		Total			129	
5.7.2	SME regime for disclosure of inside information				-1.1 (reduction)	
5.7.4	Harmonisation of insider lists		2,025		-1.2 (reduction)	
5.7.5	SME exemption for		945		-1.8	

	insiders lists				(reduction)	
5.7.8	Harmonisation of managers transactions reports	Large issuers	405		-2,2 (reduction)	
		SMEs	135		-0.1 (reduction)	
Recurring admin burden					297	
One off costs to comply with information obligations						320,3
Admin burden on SMEs					-1.2 (reduction)	

ANNEX 11 - LIST OF OPTIONS AND DISCRETIONS IN THE MARKET ABUSE DIRECTIVE AND RELATED IMPLEMENTING MEASURES[389]

A. Whether to extend the scope of application of the MAD to MTFs in full, in part or not at all (article 9)

B. Whether to require an issuer to inform the competent authority without delay of the decision to delay the disclosure of inside information (article 6.2)

C. Whether to require that managers' transaction reports are notified to bodies other than the competent authority (article 6.4), and how to apply the notification threshold of €5,000 (implementing Directive 2004/72/EC)

D. What do "all necessary measures" that Member States may take to ensure that the public is correctly informed consist of (article 6.7)

E. Whether to extend suspicious transaction reports to OTC derivatives whose underlying is traded on a regulated market and to suspicious unexecuted orders (article 6.9 of Directive 2003/6/EC and articles 7, 8, 9 and 10 of Directive 2004/72/EC)

F. How the supervisory and investigatory powers of regulators are exercised – directly; in collaboration with, or by delegation to, other authorities/market undertakings; or by application to judicial authorities; and whether to confer additional powers on regulators (article 12)

G. Whether to foresee the possibility to waive the obligation of professional secrecy and for which reasons (article 13)

H. Whether and how to disclose to the public every measure or sanction imposed for infringement of the Directive and in which circumstances this publication may not be required (article 14.4)

I. Reasons for denying assistance or joint investigations with the regulator of another Member State (article 16.4)

J. Whether to require additional items in lists of insiders and for how long these should be kept (articles 5.2 and 5.4 of implementing Directive 2004/72/EC)

K. What threshold to apply for disclosure by providers of investment advice on their interests and conflicts of interest (article 6.1(a) of Directive 2003/125/EC)

L. Whether to apply additional obligations in relation to fair presentation of recommendations (article 4.1 of Directive 2003/125/EC)

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389 All references to articles concern the level 1 Directive 2003/6/EC unless otherwise specified. The source for this list of options and discretions is the CESR review panel report of 27 January 2010, *MAD Options, Discretions and Gold-plating 2009*

M. Whether to require disclosure of additional information beyond that set out in article 5.2 of Directive 2003/125/EC

ANNEX 12: COST AND BENEFITS

7.1. Benefits

In order to estimate the overall benefit of the package of policy options a 2 step approach has been taken. First, the size of the existing problem of market abuse is estimated. Second, the benefits are estimated, in terms of the estimated reduction of market abuse which the preferred policy options are expected to achieve.

1) Estimating the size of the problem of market abuse

Attempting to quantify the size of the problem of market abuse is very difficult as it is by definition an illegal activity for which no statistics are available. This is reinforced by the fact that estimates of the actual levels of market abuse depend on a multitude of factors, such as: how many people commit market abuse which goes undetected? How many cases are detected but there is insufficient evidence to prosecute? How many cases are deemed too difficult or insignificant to prosecute by competent authorities?

Estimates of market abuse can therefore only be made indirectly, based on indicators. The following indicators can be used to quantify the size of the problem.

First of all, ***data*** from one regulator ***about suspicious financial movements*** before a major announcement (e.g. a takeover) which could include market abuse[390] could be used as a measure to indicate market abuse. It should be noted that this measure considers only insider dealing and not market manipulation in specific markets and this measure is only available for the UK, which is the only EU Member State to publish such data. In addition, this measure also includes the effect of rumours and therefore is probably an over-estimate.

Second, data from a study which attempts to quantify the cost of insider dealing, in terms of **estimated profit from insider dealing**[391]. Table 1 shows the estimated profit gained from insider dealing on 3 major exchanges which represent 48 % of market turnover in the EU[392]. Although only 3 EU exchanges are included in the study, since they are the three largest and account for such a large share of total market turnover, they can be considered representative.

Table 1 estimated profit due to insider dealing

390 This measure of market cleanliness is based on the extent to which share prices move ahead of the regulatory announcements which issuers are required to make to the market. More information on this methodology can be found at: FSA Occasional papers series, nr 25, Updated Measuring Market Cleanliness, March 2007, http://www.fsa.gov.uk/pubs/occpapers/op25.pdf. and, FSA, Occasional papers series, nr 23, Measuring Market Cleanliness, March 2006, http://www.fsa.gov.uk/pubs/occpapers/op23.pdf,

391 Capital Markets CRC Limited, *Enumerating the cost of insider trading,* unpublished, 2010, p. 8.

392 Thomson Reuters, Monthly Market share reports, 2011: Thomson Reuters website, http://thomsonreuters.com/products_services/financial/financial_products/equities_derivatives/europe/market_share_reports/#tab2

	Market turnover volume (EUR Million)	weight	estimated cumulative profit (due to market abuse) as percentage of market turnover	
			2009	average 2003-2009
Euronext	147.315	29,9%	0,0418%	0,0173%
Deutsche Borse	116.431	23,6%	0,0073%	0,0394%
LSE Group	228.765	46,4%	0,0463%	0,0455%
Total	492.511	100,0%	0,0318%	0,0341%
weighted average			0,0357%	0,0356%

Source: European Commission, Thomson Reuters, Capital Markets CRC Limited[393],

As shown in table 3, the weighted average profit gained from insider dealing on these 3 exchanges, which equates to the detriment for investors due to this form of market abuse, is estimated at 0.0356% in the period 2003-2009 and represented 0.0357% in 2009 . However, this data only estimates the profit due to insider dealing and does not encompass the estimated profit due to market manipulation. In order to reach an estimate of the full cost of market abuse, including both insider dealing and market manipulation, it seems reasonable to assume that that the cost of market manipulation would be of the same order of magnitude as insider dealing, namely 0,0353% of market turnover. Based on this assumption, the cost of market abuse, including both insider dealing and market manipulation, on these 3 markets is estimated at 0.0712% of total market turnover.

Table 3 estimated detriment due to market abuse and impact of new package

	Total impact
Market turnover Equity Markets (M EUR)	18.803.179
Estimated yearly detriment	0,0712%
Estimated yearly detriment due to market abus	13.388
Esimated reduction of market abuse	20%
Estimated benefits (M EUR)	2.677,6

Source: European Commission, Thomson Reuters 2010

To estimate the cost of market abuse for the European market as a whole, the estimated size of market abuse in terms of market turnover (0.712% of total market turnover) is extrapolated to be applied to the total market turnover of European markets. Table 3 shows the estimated yearly size of market abuse which is estimated at 0,0712% of the total market turnover. When applied to the market turnover on equity markets in 2010, the value of market abuse due to market manipulation and insider dealing is estimated at EUR 13.3 billion in 2010. This is an annual recurring number which evolves with the size or market turnover. It should be noted that the Commission considers this to be an underestimation of the full magnitude of the problem, as this is based on market turnover from equity markets only.

To estimate the expected benefits to be achieved by applying the preferred policy options, we propose applying a conservative assumption that market abuse can be reduced by 20% due to the package of measures. This assumption is based on the experience of reinforced efforts to sanction market abuse in UK (as part of the FSA's "credible deterrence" strategy) which has experienced a significant improvement of market cleanliness of 58% in the period 2008-

393 Capital Markets CRC Limited, *Enumerating the cost of insider trading,* unpublished, 2010, p. 8

2009[394]. In order to take a conservative approach to estimating the extent to which the preferred options could reduce market abuse, it seems reasonable to reduce this figure to 20%. Using this assumption, the benefits of the package of measures are estimated at EUR 2.7 billion per year, as shown in table 3 above.

7.2. Costs

In order to determine the cost implications of the package of preferred policy options in this report, a study was carried out for the Commission by external contractors[395] to estimate the impact of the possible changes to the Market Abuse Directive, particularly in terms of administrative burden, which has been summarised in annex 11. The administrative burden impacts outlined in annex 11 are considered the main cost implications of the package of retained options, particularly for industry stakeholders. In addition, the Commission services assessed the additional cost implications of the proposal, particularly with regard to the transposition and supervision of the new rules by Member States.

With regard to the compliance costs for Member States, the preferred options are expected to create some limited additional costs to conduct market surveillance. For large markets (including UK, FR, DE, IT, ES), the Commission assumes that this would require up to 3 Full Time Equivalents (FTE's) and for the remaining smaller markets, it is expected to require 1 FTE. A full time equivalent is assumed to represent 200 mandays of 8 hours at an average hourly rate of EUR 45 throughout the EU. This would lead to an estimated cost of EUR 2.7 Million per year in terms of manpower for all EU Member States to perform the supervisory activities required by the package of preferred options. In addition, Member States would probably need to invest in systems and get access to market data to ensure market monitoring of the new rules. This is expected to generate an annual cost of EUR 20.000 per year per Member State or EUR 0.5 Million per year for all Member States. Therefore, total surveillance costs are expected to amount to an estimated EUR 3,2 Million per year for all Member States.

The costs of the package on industry stakeholders relate to administrative burdens linked to information requirements and one-off costs to comply with these information obligations. These costs have been assessed in detail in Annex 11 of the report. The package of retained policy options entails an estimated administrative burden of annual recurring administrative costs of EUR 297 million, and a one off cost of EUR 320 million to comply with the information obligations.

7.3. Summary of Costs/benefits

The results of the analysis of the expected costs and benefits of the package of retained options are presented in table 4.

Table 4. Summary of costs and benefits of the package of retained options

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394 Market cleanliness in terms of abnormal pre-price announcements decreased from 10% to 4,2% in the period 2008-2009, Financial Services Authority, Annual Report 2009/2010, p35-36, table 2.2, the measures of market cleanliness for the FTSE 350, available at http://www.fsa.gov.uk/pubs/annual/ar09_10/ar09_10.pdf

395 EIM, *Effects of the changes to the Market Abuse Directive – Impact on administrative burden of firms in the EU*, Zoetermeer, December 2010, See annex 13

	Recurring (Million EUR)	One-off (Million EUR)
Benefits	**2.667, 4**	
Costs		
Compliance costs	3,2	
Administrative burden	297	320
Total Costs	**300,2**	**320**
Net Benefit	**2.367,2**	

The annual benefits in terms of the estimated reduction of market abuse are estimated at EUR 2.7 billion annually, and the annual costs are estimated at EUR 300 million (plus in the first year estimated one-off costs of EUR 320 million to comply with the information obligations).

Therefore the package of preferred policy options is expected to generate **net benefits of an estimated 2.4 billion per year.** As the new rules will extend to instruments and markets which are expected to grow in the coming years, the potential annual benefits of addressing market abuse, the potential of market abuse would be growing if these markets and would remain uncovered. Therefore, the benefits due to the new rules are expected to grow.

ANNEX 13: EFFECTS OF THE CHANGE IN THE MARKET ABUSE DIRECTIVE – IMPACT ON THE ADMINISTRATIVE BURDEN IN THE EU, EIM, DECEMBER 2012

See separate document EIM Report

RAT DER EUROPÄISCHEN UNION

Brüssel, den 25. Oktober 2011 (OR. en)

Interinstitutionelles Dossier: 2011/0297 (COD)

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ÜBERMITTLUNGSVERMERK

Absender:	Herr Jordi AYET PUIGARNAU, Direktor, im Auftrag der Generalsekretärin der Europäischen Kommission
Eingangsdatum:	21. Oktober 2011
Empfänger:	der Generalsekretär des Rates der Europäischen Union, Herr Uwe CORSEPIUS
Nr. Komm.dok.:	SEK(2011) 1218 endgültig
Betr.:	ARBEITSDOKUMENT DER KOMMISSIONSDIENSTSTELLEN ZUSAMMENFASSUNG DER FOLGENABSCHÄTZUNG Begleitunterlage zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation (Marktmissbrauch) und zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation

Die Delegationen erhalten in der Anlage das Kommissionsdokument SEK(2011) 1218 endgültig.

Anl.: SEK(2011) 1218 endgültig

EUROPÄISCHE KOMMISSION

Brüssel, den 20.10.2011
SEK(2011) 1218 endgültig

ARBEITSDOKUMENT DER KOMMISSIONSDIENSTSTELLEN

ZUSAMMENFASSUNG DER FOLGENABSCHÄTZUNG

Begleitunterlage zum / zur

Vorschlag für eine
Richtlinie des Europäischen Parlaments und des Rates über strafrechtliche Sanktionen für Insider-Geschäfte und Marktmanipulation

und

Vorschlag für eine
Verordnung des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation (Marktmissbrauch)

{KOM(2011) 651 endgültig}
{SEK(2011) 1217 endgültig}

1. PROBLEMSTELLUNG

Die Marktmissbrauchslinie zielt darauf ab, das Anlegervertrauen und die Marktintegrität zu verbessern, indem sie Personen, die über Insider-Informationen verfügen, den Handel mit davon betroffenen Finanzinstrumenten („Insider-Geschäfte“) untersagt und die Manipulation der Märkte durch Praktiken wie die Verbreitung von falschen Informationen oder Gerüchten und den Abschluss von Transaktionen, mit denen das Erzielen eines anormalen Kursniveaus gesichert wird, („Marktmanipulation“) verbietet.

Die Marktmissbrauchsrichtlinie sieht einige Instrumente zur Verhinderung und Aufdeckung von Marktmissbrauch vor, darunter Insiderlisten, die Meldung verdächtiger Geschäfte und die Offenlegung der Eigengeschäfte von Führungskräften. Zudem verpflichtet sie die Emittenten von Finanzinstrumenten, die auf einem geregelten Markt gehandelt werden, die ihnen vorliegenden Insider-Informationen so bald wie möglich zu veröffentlichen, wobei die Aufschubmöglichkeiten beschränkt werden.

Im Interesse einer wirksamen Durchsetzung werden die zuständigen nationalen Behörden ermächtigt, Ermittlungen vorzunehmen, verwaltungsrechtliche Maßnahmen zu ergreifen und „wirksame, verhältnismäßige und abschreckende“ Sanktionen zu verhängen.

Die Marktmissbrauchsrichtlinie gibt einen Rahmen für die Harmonisierung zentraler Konzepte und Vorschriften in Bezug auf den Marktmissbrauch und zur Stärkung der Zusammenarbeit zwischen den Regulierungsbehörden vor. Dennoch haben die Kommissionsdienstellen einige Probleme festgestellt, die nachstehend eingehender beleuchtet werden.

1.1. Regulierungslücken hinsichtlich neuer Märkte, Plattformen und außerbörslicher Instrumente (OTC-Instrumente)

Sind Finanzinstrumente zum Handel an einem geregelten Markt zugelassen, so unterliegt jeglicher Handel mit diesem Instrument der Marktmissbrauchsrichtlinie, unabhängig davon, ob er auf einem multilateralen Handelssystem (MTF), auf einem elektronischen Handelssystem („Broker Crossing Network“) oder außerbörslich (OTC) erfolgt. Was Insider-Geschäfte (nicht jedoch die Marktmanipulation) angeht, gilt das Verbot auch für Finanzinstrumente, die nicht zum Handel an einem geregelten Markt zugelassen sind, deren Wert jedoch von einem solchen Finanzinstrument abhängt.

Diese Konzentration auf Instrumente, die an geregelten Märkten gehandelt werden, wurde jedoch von den Marktentwicklungen überholt. Ein stärkerer Wettbewerb und ein umfangreicherer Einsatz von Technologien haben zu einer verstärkten Nutzung von MTF und anderen organisierten Handelssystemen (wie Crossing Networks) für Handelsinstrumente geführt. Auch die OTC-Märkte haben an Bedeutung gewonnen. Instrumente, die nicht zum Handel an einem geregelten Markt zugelassen sind, sondern nur auf einem MTF, einem sonstigen System oder außerbörslich gehandelt werden, sind von der Marktmissbrauchsrichtlinie nicht erfasst.

Zudem wurden Bedenken geäußert, dass die zunehmende Fragmentierung des Handels über die verschiedenen Märkte hinweg eine wirksame Durchsetzung beeinträchtigen könnte und unterschiedliche Überwachungsstandards für die verschiedenen Arten von Handelsplätzen ungleiche Rahmenbedingungen nach sich ziehen könnten. Ferner wirft der zunehmende Trend zum automatisierten Handel und zum Hochfrequenzhandel (HFT) die Frage auf, wie die Regulierungsbehörden einen solchen Handel überwachen können und ob bestimmte, möglicherweise missbräuchliche Strategien von der Marktmissbrauchsrichtlinie angemessen erfasst sind.

1.2. Regulierungslücken hinsichtlich der Waren- und Warenderivatemärkte

Marktmissbrauch kann markt- und grenzübergreifend stattfinden. Dies gibt insbesondere hinsichtlich der Waren- und Warenderivatemärkte Anlass zur Besorgnis, da die Integritäts- und Transparenzvorschriften zwar für die Derivatemärkte, nicht aber für die ihnen zugrunde liegenden Märkte gelten.

Die Marktmissbrauchsrichtlinie verpflichtet die Finanzaufsichtsbehörden bisher nicht, Entwicklungen an den Warenmärkten zu berücksichtigen, wenn sie die Finanzmärkte auf einen möglichen Marktmissbrauch hin prüfen, oder mit den für die Warenmärkte zuständigen Regulierungsbehörden in der EU oder in Drittländern zusammenzuarbeiten oder Informationen auszutauschen. Die fehlende Zusammenarbeit zwischen den Regulierungsbehörden für die Finanzmärkte und die Warenmärkte könnte jedoch die Integrität beider Arten von Märkten schwächen.

Warenmärkte unterliegen nicht denselben Integritäts- und Transparenzanforderungen an die Handelstätigkeiten wie Finanzmärkte. Der Derivatehandel darf den Kurs von Finanzinstrumenten nicht verzerren. Kommt es jedoch durch einen Derivatehandel zu einer Kursverzerrung an den zugrunde liegenden Warenmärkten oder durch den Warenhandel zu einer Verzerrung der Kurse von Finanzinstrumenten, greift die derzeitige Definition der Marktmanipulation nicht. Die Regulierungsbehörden befürchten daher, dass Derivatemärkte zur Manipulation der zugrunde liegenden Warenmärkte genutzt werden könnten.

Zudem gibt es keine allgemeingültigen Vorschriften über die Art der offenzulegenden Informationen, und es bestehen Bedenken hinsichtlich eines Mangels an Transparenz hinsichtlich grundlegender Informationen an den Warenmärkten. Dies zieht Probleme für Anleger an Warenderivatemärkten nach sich, da der Wert eines Derivats in hohem Maße von dem zugrunde liegenden Instrument oder der zugrunde liegenden Ware abhängt. Es bringt jedoch auch Probleme für die Aufsichtsbehörden, die Transaktionen an diesen Märkten nicht auf einen möglichen Missbrauch hin überwachen können.

1.3. Keine wirksame Durchsetzung durch die Regulierungsbehörden

Erstens verfügen die Regulierungsbehörden nicht über alle notwendigen Befugnisse zur Aufdeckung von Marktmissbrauch. So erhalten sie beispielsweise keine Meldungen über verdächtige Transaktionen mit OTC-Derivaten, obwohl diese missbräuchlich genutzt werden können. In einigen Mitgliedstaaten können die Regulierungsbehörden keine vorhandenen Daten- und Telefonverkehrsaufzeichnungen der Telekommunikationsbetreiber anfordern, die

jedoch als Nachweis für die Untersuchung und Ahndung von Marktmissbrauch, insbesondere Insider-Geschäfte, erforderlich wären. Bestimmte Fälle des Marktmissbrauchs, die verwaltungsrechtlichen Sanktionen unterliegen, können daher möglicherweise nicht aufgedeckt und geahndet werden. Der Zugang zu solchen Daten ist eine wesentliche Voraussetzung für die Erfüllung der Untersuchungs- und Durchsetzungsaufgaben der Regulierungsbehörden. Einige Regulierungsbehörden sind nicht befugt, Privaträume zu betreten und dort Unterlagen sicherzustellen. Zudem stehen den Regulierungsbehörden in einigen Fällen keine Primärinformationen von Informanten zur Verfügung, da diese keine Anreize erhalten und möglicherweise nicht ausreichend geschützt sind. Schließlich verfügen die Regulierungsbehörden nicht über die erforderlichen Instrumente, um gegen „versuchte Marktmanipulation" (d. h. gescheiterte Versuche der Marktmanipulation) vorzugehen.

Zweitens verfügen nicht alle zuständigen Behörden über sämtliche erforderlichen Sanktionsbefugnisse, um alle Missbrauchsfälle angemessen ahnden zu können. In acht Mitgliedstaaten haben die zuständigen Behörden beispielsweise nicht die Möglichkeit, bei Verstößen Zulassungen zu entziehen. In einigen Mitgliedstaaten ist die Höhe der Geldbußen zudem niedrig und nicht abschreckend genug. Ist der durch den Marktmissbrauch erreichbare Gewinn jedoch höher als die erwartete Sanktion, verringert sich deren abschreckende Wirkung. Zudem stellen nicht alle zuständigen Behörden sicher, dass die verhängten Sanktionen veröffentlicht werden, was für eine wirksame Durchsetzung von großer Bedeutung wäre. Darüber hinaus stehen in einigen Mitgliedstaaten keine strafrechtlichen Sanktionen für bestimmte Fälle von Insider-Geschäften und Marktmanipulation zur Verfügung, obwohl solche Sanktionen stark abschreckend wirken würden. Diese Abweichungen schwächen den Binnenmarkt, lassen Spielraum für Aufsichtsarbitrage und erschweren die grenzübergreifende Zusammenarbeit der Durchsetzungsbehörden.

1.4. Mangelnde Klarheit und Rechtssicherheit

Die Marktmissbrauchsrichtlinie sieht bestimmte Optionen und Ermessensspielräume sowie Bestimmungen vor, die Interpretationsspielraum bei der praktischen Anwendung lassen. Diese Abweichungen und Zweideutigkeiten führen zu Unterschieden in den Vorschriften der einzelnen Mitgliedstaaten. Dem De-Larosière-Bericht zufolge sind Optionen und Ermessensspielräume ein Grund für Wettbewerbsverzerrungen und Aufsichtsarbitrage und stehen somit einem reibungslosen Funktionieren des Binnenmarkts im Weg. Dies betrifft insbesondere das Konzept der zulässigen Marktpraktiken (AMP), die Offenlegung von Insider-Informationen durch die Emittenten und die Verpflichtung der Führungskräfte von Emittenten, Eigengeschäfte mit Finanzinstrumenten zu melden.

1.5. Unverhältnismäßiger Verwaltungsaufwand für die Emittenten, insbesondere KMU

Ferner wurde darauf hingewiesen, dass nur wenige KMU Kapital an den Wertpapiermärkten aufnehmen, unter anderem da die anfänglichen und laufenden Kosten der Notierung die Vorteile einer solchen Kapitalaufnahme überwiegen und die EU-Vorschriften für KMU ein zu hohes Hindernis für den Zugang zu diesen Märkten darstellen. Würde die Marktmissbrauchsrichtlinie ohne Anpassungen auf MTF angewandt, hätten KMU, die an solchen Märkten notiert sind, höhere Kosten

zu tragen, da bisher für die KMU-Märkte in mehreren Mitgliedstaaten besondere Regelungen gelten, um deren Kosten niedrig zu halten. Als besonders problematisch bezeichnen die beteiligten Akteure in diesem Zusammenhang die Verpflichtungen zur Offenlegung kursrelevanter Informationen, zur Erstellung von Insiderlisten und zur Offenlegung der Eigengeschäfte von Führungskräften. Ihrer Ansicht nach sind diese mit einem erheblichen finanziellen und administrativen Aufwand für kleinere börsennotierte Unternehmen verbunden.

2. BASISSZENARIO UND SUBSIDIARITÄT

Werden keine Maßnahmen auf EU-Ebene ergriffen, so wird es wahrscheinlich keine koordinierte Reaktion auf die vorstehend genannten Probleme geben, die somit in Zukunft erneut auftreten könnten. Infolgedessen würden bestimmte Märkte und Transaktionen nicht von den Vorschriften über Marktmissbrauch erfasst, bestimmte Missbrauchsfälle würden nicht oder nur unzureichend geahndet, und der mit den unterschiedlichen nationalen Rechtsvorschriften verbundene Verwaltungsaufwand würde weiter bestehen. Wenngleich alle genannten Probleme signifikante Auswirkungen in jedem einzelnen Mitgliedstaat haben, kann ihre Gesamtauswirkung nur im grenzübergreifenden Kontext vollständig erfasst werden. Denn Marktmissbrauch ist überall dort möglich, wo das betreffende Instrument notiert ist oder außerbörslich gehandelt wird, so dass ein reales Risiko besteht, dass nationale Maßnahmen zur Bekämpfung des Marktmissbrauchs umgangen werden oder unwirksam bleiben, wenn nicht auch EU-weit Maßnahmen getroffen werden. Auch zur Verhinderung von Aufsichtsarbitrage ist ein einheitliches Vorgehen unumgänglich. Vor diesem Hintergrund erscheinen Maßnahmen auf EU-Ebene im Sinne des Grundsatzes der Subsidiarität als angebracht.

Nach dem Grundsatz der Verhältnismäßigkeit müssen die Maßnahmen gezielt sein und dürfen nicht über das zur Erreichung der Ziele erforderliche Maß hinausgehen. An diesem Grundsatz orientierten sich die Ermittlung alternativer Optionen sowie die Analyse und der Vergleich der einzelnen Optionen.

3. ZIELSETZUNGEN

Vor dem Hintergrund der vorstehenden Problemanalyse bestehen die allgemeinen Ziele der Überarbeitung der Marktmissbrauchsrichtlinie darin, die Marktintegrität und den Anlegerschutz zu erhöhen und ein einheitliches Regelwerk und gleiche Rahmenbedingungen sicherzustellen. Gleichzeitig soll der Wertpapiermarkt für die Kapitalaufnahme durch KMU attraktiver werden.

Im Hinblick auf das Erreichen dieser allgemeinen Ziele müssen folgende Einzelziele erreicht werden:

(1) Gewährleistung, dass die Regulierung mit den Marktentwicklungen Schritt hält;

(2) Sicherstellung einer wirksamen Durchsetzung der Vorschriften über den Marktmissbrauch;

(3) Stärkung der Wirksamkeit der Vorschriften über den Marktmissbrauch durch größere Klarheit und Rechtssicherheit;

(4) Soweit möglich, Verringerung des Verwaltungsaufwands, insbesondere für KMU.

4. POLITIKOPTIONEN

Die Politikoptionen sind entsprechend den operativen Zielen, die sich aus den vorstehend genannten spezifischen Zielen ergeben, in Gruppen eingeteilt.

4.1. Verhinderung des Marktmissbrauchs an organisierten Märkten und auf Plattformen sowie bei OTC-Transaktionen

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Ausweitung der Vorschriften über den Marktmissbrauch auf Credit Default Swaps (CDS).

(3) Option 3 – Ausweitung der Vorschriften über die Marktmanipulation auf OTC-Instrumente;

(4) Option 4 – Ausweitung der Vorschriften über den Marktmissbrauch auf Instrumente, die nur zum Handel auf MTF zugelassen sind;

(5) Option 5 – Ausweitung der Vorschriften über den Marktmissbrauch auf Instrumente, die nur zum Handel auf anderen Handelssystemen (außer MTF) zugelassen sind;

(6) Option 6 – Ausweitung der Vorschriften über den Marktmissbrauch auf (bilateral) außerbörslich gehandelte Instrumente;

(7) Option 7 – bessere Aufsicht über HFT;

(8) Option 8 – bessere Beaufsichtigung von Wertpapierunternehmen, die Handelssysteme wie z. B. MTF betreiben.

4.2. Verhinderung des Marktmissbrauchs an Warenmärkten und damit verbundenen Derivatemärkten

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Ausweitung der Definition der Begriffe „Insider-Informationen" und „Marktmanipulation" auf Waren-Spot-Kontrakte;

(3) Option 3 – Definition des Begriffs „Insider-Informationen" in Bezug auf Warenderivate;

(4) Option 4 – Verpflichtung der Händler an Spotmärkten, den zuständigen Behörden die angeforderten Informationen bereitzustellen;

(5) Option 5 – Förderung der internationalen Zusammenarbeit der für Finanz- und Warenmärkte zuständigen Aufsichtsbehörden;

(6) Option 6 – Verpflichtung der Emittenten von Warenderivaten zur Veröffentlichung von kursrelevanten Informationen;

(7) Option 7 – Klärung des Begriffs der Marktmanipulation im Bereich der Warenderivate.

4.3. Gewährleistung, dass die Regulierungsbehörden über die für eine wirksame Durchsetzung erforderlichen Informationen und Befugnisse verfügen

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Einführung von Vorschriften zur Meldung von verdächtigen Aufträgen und OTC-Transaktionen;

(3) Option 3 – Verhinderung versuchter Marktmanipulation;

(4) Option 4 – Gewährleistung des Zugangs zu Daten- und Telefonverkehrsaufzeichnungen von Telekommunikationsbetreibern, um Marktmissbrauchsfälle auf richterliche Anordnung hin untersuchen und ahnden zu können;

(5) Option 5 – Gewährleistung des Zugangs zu Privaträumen, um Marktmissbrauchsfälle auf richterliche Anordnung hin untersuchen und ahnden zu können;

(6) Option 6 – Schutz und Anreize für Informanten.

4.4. Gewährleistung einheitlicher, wirksamer und abschreckender Sanktionen

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – gemeinsame Mindestvorschriften für verwaltungsrechtliche Maßnahmen und Sanktionen;

(3) Option 3 – einheitliche verwaltungsrechtliche Maßnahmen und Sanktionen;

(4) Option 4 – Verpflichtung zur Einführung strafrechtlicher Sanktionen;

(5) Option 5 – gemeinsame Mindestvorschriften für strafrechtliche Sanktionen;

(6) Option 6 – bessere Durchsetzung der Sanktionen.

4.5. Beschränkung oder Abschaffung von Optionen und Ermessensspielräumen

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Harmonisierung der zugelassenen Marktpraktiken;

(3) Option 3 – Abschaffung der zugelassenen Marktpraktiken und schrittweises Auslaufen bestehender Praktiken.

4.6. Klärung bestimmter zentraler Begriffe

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Klärung der Bedingungen für einen Aufschub der Offenlegung von Insider-Informationen;

(3) Option 3 – Meldung des Aufschubs der Offenlegung von Insider-Informationen;

(4) Option 4 – Bestimmung der Bedingungen für einen Aufschub der Offenlegung im Falle von Systemrelevanz;

(5) Option 5 – Klärung der Offenlegung der Eigengeschäfte von Führungskräften.

4.7. Verringerung des Verwaltungsaufwands, insbesondere für KMU

(1) Option 1 – keine EU-Maßnahmen;

(2) Option 2 – Vorschriften über die Offenlegung von Insider-Informationen durch KMU;

(3) Option 3 – Ausnahme von KMU in Bezug auf die Pflicht zur Offenlegung von Insider-Informationen;

(4) Option 4 – Harmonisierung der Insiderlisten;

(5) Option 5 – Ausnahme von KMU in Bezug auf Insiderlisten;

(6) Option 6 – Abschaffung der Pflicht zur Meldung der Eigengeschäfte von Führungskräften;

(7) Option 7 – Harmonisierung der Anforderungen an die Meldung der Eigengeschäfte von Führungskräften, einschließlich einer höheren Schwelle für alle Emittenten, darunter auch KMU;

(8) Option 8 – Vorschriften für KMU hinsichtlich der Meldung von Eigengeschäften von Führungskräften.

5. Folgenabschätzung hinsichtlich der bevorzugten Politikoptionen

Die verschiedenen Politikoptionen wurden anhand von Kriterien wie Wirksamkeit und Effizienz auf das Erreichen der jeweiligen Ziele hin geprüft. Der Vergleich führte zu folgenden Ergebnissen:

– *Geregelte Märkte, Plattformen und OTC-Transaktionen:* Die bevorzugte Option ist eine Kombination der Optionen 2, 3, 4, 5, 7 und 8. Eine Kombination der Optionen 4, 5 und 8 würde gleiche Ausgangsbedingungen schaffen und ein hohes Niveau des Anlegerschutzes und der Integrität der Märkte für Finanzinstrumente sicherstellen, unabhängig vom Ort ihrer Zulassung zum Handel. Eine Kombination der Optionen 2 und 3 würde gewährleisten, dass eine Manipulation

der Märkte für die zugrunde liegenden Instrumente durch OTC-Derivate wie CDS klar verboten wird. Option 7 würde es den Regulierungsbehörden einfacher machen, manipulative Praktiken im Rahmen des Hochfrequenzhandels aufzudecken und zu ahnden.

– *Warenderivate*: Die bevorzugte Option ist eine Kombination der Optionen 3, 4, 5 und 7. Gemeinsam stellen diese Optionen sicher, dass vorhandene Definitionen und Verbote geklärt werden, so dass alle instrumentenübergreifenden manipulativen Strategien vollständig erfasst und gleiche Rahmenbedingungen für die Anleger geschaffen werden. Was die Kosten angeht, könnte die Absicherung für die Hersteller teurer werden, und die Aufsichtsbehörden müssten in zusätzliche Datenverarbeitungs- und Überwachungsinstrumente investieren. Was die Vorteile betrifft, erhalten die Anleger Klarheit darüber, welche Informationen sie erwarten können und wie sie sich am Derivatemarkt verhalten müssen.

– *Befugnisse der Regulierungsbehörden:* Die bevorzugte Option ist eine Kombination der Optionen 2, 3, 4, 5 und 6. Die Kombination dieser Optionen gewährleistet, dass die Regulierungsbehörden über die erforderlichen Befugnisse zur Aufdeckung von Marktmissbrauch verfügen, insbesondere da die Aufdeckung verdächtiger OTC-Transaktionen und –Aufträge erleichtert und versuchter Marktmissbrauch geahndet wird. Das Paket stellt sicher, dass die Behörden auf Daten- und Telefonverkehrsaufzeichnungen der Telekommunikationsbetreiber zugreifen und im Rahmen bestimmter Rechtsgarantien Privaträume betreten können, wenn sie einen begründeten Verdacht des Marktmissbrauchs haben, wobei die Datenschutzrichtlinie für die elektronische Kommunikation und die Charta der Grundrechte einzuhalten sind. Zudem trägt das Paket durch Anreize für Informanten und deren Schutz vor Vergeltungsmaßnahmen zu einer verbesserten Aufdeckung bei.

– *Sanktionen*: Die bevorzugte Option ist eine Kombination der Optionen 2, 4 und 6. Diese sich gegenseitig verstärkenden Optionen gewährleisten, dass im Rahmen der Vorschriften über den Marktmissbrauch wirksame, verhältnismäßige und abschreckende Sanktionen verhängt werden. Im Einklang mit Artikel 83 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) ist die Verpflichtung zur Einführung von strafrechtlichen Sanktionen für Rechtsverstöße im Bereich des Insider-Geschäfte und der Marktmanipulation auf EU-Ebene ein wesentliches und verhältnismäßiges Mittel zur Schaffung eines funktionierenden Binnenmarkts.

– *Optionen und Ermessensspielräume:* Die bevorzugte Option ist Option 3. Die Umsetzung dieser Option würde die Rechtsunsicherheit verringern, den anwendbaren Rechtsrahmen klären und zur Schaffung eines einheitlichen Regelwerks in der EU beitragen.

– *Zentrale Begriffe:* Die bevorzugte Option ist eine Kombination der Optionen 3, 4 und 5. Eine Kombination aus diesen Optionen würde eine größere Rechtssicherheit nach sich ziehen, was einen Aufschub der Offenlegung und Eigengeschäfte von Führungskräften angeht, und gleichzeitig eine derzeit in der Richtlinie vorgesehene Option beseitigen.

– *KMU/Verwaltungsaufwand:* Die bevorzugte Option ist eine Kombination der Optionen 2, 4, 5 und 7. Diese vier Optionen würden den mit den Emittentenverpflichtungen verbundenen Verwaltungsaufwand im Rahmen der Vorschriften über den Marktmissbrauch umfassend verringern und wären mit der Einführung eines KMU-spezifischen Regelwerks über den Marktmissbrauch mit einem verringerten Verwaltungsaufwand verbunden.

6. Überwachung und Bewertung

Die Kommission wird überwachen, wie die Mitgliedstaaten die in dieser Legislativinitiative zum Marktmissbrauch vorgeschlagenen Änderungen anwenden. Die Bewertung der Folgen, die sich aus der Anwendung der Legislativmaßnahme ergeben, könnte drei Jahre nach deren Inkrafttreten in Form eines Berichts der Kommission an den Rat und das Europäische Parlament erfolgen. Dieser Bericht könnte sich auf Daten der zuständigen nationalen Behörden zu den Sanktionen für Marktmissbrauch und auf einen Bericht der ESMA zu den Erfahrungen der Regulierungsbehörden stützen.

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